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79

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BY THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL ON APPEALS
FROM INDIA,
BY THE FEDERAL COURT
AND
BY THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

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JUDGES OF THE HIGH COURT.

1944.

—:o:—

Chief Justice.

The Hon'ble Sir Harold Derbyshire, KT., K. C., M. C.

Puisne Judges.

The Hon'ble Mr. Justice Torick Ameer Ali, KT.
" G. D. McNair.
" Syed Nasim Ali, M. A., B. L.
" A. G. R. Henderson, B. A., I. C. S.
" R. C. Mitter, M. SC., M. L.
" N. A. Khundkar.
" B. N. Rau, KT., C. I. E., I. C. S. *(on deputation).*
" N. G. A. Edgley, I. C. S.
" B. K. Mukherjea, M. A., D. L.
" C. C. Biswas, M. A., B. L., C. I E.
" R. F. Lodge, B. A., I. C. S.
" F. W. Gentle.
" A. N. Sen.
" T. J. Y. Roxburgh, C. I. E., I. C. S.
" A. S. M. Akram, B. L.
" A. L. Blank, I. C. S.
" S. R. Das.
" W. Mc Cormic Sharpe, D. SC. B. A., I. C. S.
" A. S. M. Latifur Rahman, M. A. (Cantab).
" E. C. Ormond.

Advocate-General.

Mr. S. M. Bose.

Senior Standing Counsel.

Mr. J. N. Majumdar.

Senior Government Pleader.

Dr. S. C. Basak, M. A., D. L.

EDITORS.

Ashutosh Mukerji, M. A., B. L.

Ramendra Mohan Majumdar, M. SC., B. L.

The Calcutta Law Journal.

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SPECIAL BENCH

Before Mr. Justice Syed Nasim Ali, Mr. Justice R. C. Mitter, and Mr. Justice Sharpe.

BROJENDRA LAL ROY,
AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVES,
SWARNAMOYI ROY AND OTHERS
v.
MUBESWAR ALI CHOUDHURY AND ANOTHER.*

CIVIL.
1944.
July. 26, August, 29.

Rent, suit for—The Assam (Temporarily Settled Districts) Tenancy Act, 1935, sections 1(2), 3(17), 44—Retrospective effect of statute—Pre-Act right of landlord to recover cash rent—Limitation—Empowering Executive Government to fix by notification the date on which the Act is to come into operation—Right of suit.

The Assam (Temporarily Settled Districts) Tenancy Act, 1935, does not take away the pre-Act right of the landlord to recover cash rent at the contractual rate.

Provisions of Statute which touch a right in existence at the passing of the Statute should not be applied retrospectively in the absence of express enactment or necessary intentment.

The Colonial Sugar Refining Company Limited v. *Irving* (1) and *General Mills Company Limited* v. *Income Tax Commissioners, Delhi* (2) referred to.

A right of suit is a vested right.

The defendants took settlement of 16 bighas odd land in the District of Cachar (temporarily settled district in the Province of Assam) from the plaintiffs

* Appeal from Appellate Decree No. 1547 of 1940 with Cross-objection, against the decree of N. L. Hindley, Esq., District Judge of Cachar, dated the 31st May, 1940, affirming that of Nagendra Nath Chakravarty, Esq., Sadar Munsiff, Silchar, dated the 27th February, 1940.

(1) [1905] A. C. 369.
(2) (1927) L. R. 54 I. A. 421 ; 47 C. L. J. 1.

CIVIL.

1944.

Brojendra Lal Roy v. Mubeswar Ali Choudhury.

by executing a registered Kabuliat on the 10th Bhadra, 1341 corresponding to 27th August, 1934, for 15 years at an annual rent of Rs. 70. The Assam (Temporarily Settled Districts) Tenancy Act, 1935 was passed in 1935 but came into force on the 1st March, 1937.

On 26th July, 1939, the plaintiffs instituted the present suit for recovery of arrears of rent from 1341 to 1345 B. S. at the stipulated rate of Rs. 70 per year. The defence of the tenant was that they were not liable to pay more than Rs. 7-8 annas per year, that is, five times the annual revenue of the disputed land in view of the provisions of section 44 read with section 3(17) of the Assam (Temporarily Settled Districts) Tenancy Act, 1935:

Held, that the plaintiffs were entitled to recover rent at the contractual rate, that is Rs. 70 per year for the entire period in suit and not for the period 1341 to 1342 B. S.

Before the Assam Tenancy Act came into force the period of limitation for recovery of arrears of rent was 6 years. The Assam Tenancy Act reduced this period to 3 years:

Held, that the plaintiffs' claim for recovery of arrears of rent for 1341 and 1342 was not barred by limitation, as the vested right was not taken away by the Assam Tenancy Act, 1935.

Iswar Chandra Pal v. *Priti Lata Biswas* (1) followed.

From the provision of a Statute which empowers the Executive Government to fix by notification the date on which the Act is to come into operation, it cannot be inferred that the Legislature intended the Act to apply to suits the cause of action of which arose before the Act came into force.

Appeal by the Plaintiff and cross-objection by the Defendants.

Suit for rent.

Messrs. Hemendra Kumar Das and *Himanshu Chandra Choudhury* for the Appellants.

Mr. Satyendra Kishore Ghose for the Respondents.

C. A. V.

August, 29.

Nasim Ali, J.:—This second appeal arises out of a suit for recovery of arrears of rent.

The defendants took settlement of 16 bighas 15 cottas 9 chattacks of land in the district of Cutcher (a temporarily settled district in the Province of Assam) from the plaintiffs by executing a registered Kabuliat on 10th Bhadra, 1341 B. S. corresponding to 27th of August, 1934, for 15 years at an annual rent of Rs. 70. The Assam (Temporarily Settled Districts) Tenancy Act, 1935, came into force on 1st March, 1937. On 26th July, 1939, the plaintiffs instituted the present suit for recovery of arrears of rent from 1341 to 1345 B. S. at the stipulated rate of Rs. 70 per year,

(1) (1943) 48 C. W. N. 266.

CIVIL.

1944.

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Nasim Ali, J.

The defence of the tenants is that they are not liable to pay more than 7-8 per year *i.e.* 5 times the annual revenue of the disputed lands in view of the provisions of Section 44 read with Section 3(17) of the Assam (Temporarily Settled Districts) Tenancy Act, 1935.

The Munsiff held that the plaintiffs are entitled to recover rent at the rate of Rs. 70 per year for 1341 and 1342 B. S. and at the rate of Rs. 7-8 per year for 1343, 1344 and 1345 B. S.

Two appeals were preferred before the lower appellate Court —one by the landlords and the other by the tenants. The learned District Judge dismissed both the appeals and affirmed the judgment and decree of the Munsiff. The present second appeal is by the plaintiffs. The defendants have also filed cross-objections.

The contention of the plaintiffs in their appeal is that the Courts below were wrong in holding that the plaintiffs were not entitled to get rent for the years 1343-45 B. S. at the Kabulyat rate.

Section 44 of the Assam Tenancy Act, 1935 is in these terms.

"Except as provided for in Sections 25 and 26, no rent agreed on between landlord and tenant or enhanced by Court shall exceed the maximum rent in respect of the land; nor shall any such amount which is an excess of the maximum rent be lawfully payable."

The words "maximum rent" have been defined in Section 3 clause 17 of the Act thus :

"Maximum rent or rate of rent of agricultural holdings or parts thereof held on cash rent means a sum representing in the case of Cachar 5 times and in the case of other districts 3 times the revenue rate. Where agricultural holdings or parts thereof are held on produce rent maximum rent, means in the case of paddy ½ and in the case of jute 1/3rd of the actual produce thereof."

Before the Act came into force plaintiffs held the right to recover rent at the stipulated rent of Rs. 70 per year. The question is whether this right of the plaintiffs has been touched by Section 44 of the Act.

Provisions of statute which touch a right in existence at the passing of the statute should not be applied retrospectively in the absence of express enactment or necessary intendment : *The Colonial Sugar Refining Company Limited* v. *Irving* (1); *Delhi Cloth and General Mills Company Limited* v. *Income Tax Commissioners, Delhi* (2). Section 123(i) (g) of the Act is in these terms :

"Nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall entitle a landlord

(1) (1905) A. C. 369. (2) (1927) L.R. 54 I. A. 421 ; 47 C. L. J. 1.

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where the rent is payable in produce to recover as rent produce in excess of half (or in the case of paddy one-third) of the gross produce of the land for the year for which rent is claimed.'"

The section expressly takes away the pre-Act right of the landlord based on contract to recover produce rent in excess of half of the gross produce of the land. There is no provision in the Act which expressly takes away the pre-Act right of the landlord to recover cash rent at the contractual rate. The contention of the tenants however is that the necessary implication of the words "nor shall.....be lawfully payable" in the last part of Section 44 is that the section is retrospective in its operation. The words "any such amount" after the word "shall" mean "amount of rent agreed on between landlord and tenant or enhanced by Court." Before the Act came into force the Court had no power to enhance the rent. The Act for the first time empowers the Court to enhance the rent. The section therefore contemplates amount of rent agreed upon between landlord and tenants or enhanced by Court after the Act. We are therefore of opinion that contracts about rent after the Act are hit by Section 44 and that pre-Act contracts are not touched by this section. This view finds support from the omission of cash rent in Section 123(g) of the Act. The plaintiffs are, therefore, entitled to recover rent at the contract rate *i.e.* Rs. 70 per year for the entire period in suit.

The defendents in their cross-objection urge that the Courts below should have held that the plaintiffs' claim for rent for 1341 and 1342 is barred by limitation.

Before the Assam Tenancy Act came into force the period of limitation for recovery of arrears of rent was 6 years. The Assam Tenancy Act, however, has reduced this period to three years. The Act was passed in 1935: Section 1(2) of the Act is in these terms:

"It shall come into force on such date as the Local Government may by notification appoint in this behalf."

By notification under this section the Act came into force on the 1st of March, 1937. The cause of action for recovery of arrears of rent for 1341 and 1342 arose before the Act came into force. A right of suit is a vested right. The question is whether there is anything in the Assam Tenancy Act which shows that this vested right was taken away by the Act. There is no provision in the Act which expressly takes away this vested right. It is contended on behalf of the defendants that the necessary implication of the provision in section 1 (2) of the Act that the Act shall come into operation at a date to be notified by the Local

Government is that the legislature intended that the period of limitation would apply to suit the cause of action of which arose before the Act. In *Iswar Chandra Pal* v. *Priti Lata Biswas* (1) it has been held by a Division Bench of this Court that from the provision of a statute (Sylhet Tenancy Act, 1935) which empowers the executive Government to fix by notification the date on which the Act is to come into operation it cannot be inferred that the legislature intended the Act to apply to suits the cause of action of which arose before the Act came into force. We are of opinion that this view is quite correct. We accordingly hold that the plaintiffs' claim for recovery of arrears of rent for 1341 and 1342 is not barred by limitation.

The result therefore is that the cross-objections are dismissed and the appeal is allowed. Plaintiffs' suit is decreed in full with costs in all the Courts.

There will be no order for costs in the cross-objections.

Mitter, J. :—I agree.

Sharpe, J. :—I agree.

A. T. M. *Appeal decreed :*
Cross-objection dismissed.

(1) (1943) 48 C. W. N. 266.

FEDERAL COURT.

PRESENT : *W. P. Spens, Esq., Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

IN RE. THE POWERS OF THE FEDERAL LEGISLATURE TO PROVIDE FOR THE LEVY OF AN ESTATE DUTY IN RESPECT OF PROPERTY, OTHER THAN AGRICULTURAL LAND, PASSING UPON THE DEATH OF ANY PERSON

AND

IN RE. A REFERENCE UNDER SECTION 213 OF THE GOVERNMENT OF INDIA ACT, 1935.

F. C.
1944.
August, 25.

Reference—Federal power, if can legislate for the levy of Estate Duty—Advisory jurisdiction—Constitution Act, 1935, section 213—Question relating to future legislation—Charging section, scope of—Notification under section 104 of the Constitution Act—"Shall be deemed to include".

As the Federal Court is not confined strictly to question of interpretation of the terms used in the Reference and as invited to give its opinion on the

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Re Reference under S. 213 of the Govt. of India Act.

assumption that the tax referred to in the Reference as proposed to be levied is one resting on the same essential bases and having the same essential incidents as Estate Duty in the English Law, on that assumption the Court delivered the following

Opinion.

The Federal Legislature has no power to make a law providing for the levy of Estate Duty of the nature and with the incidents of Estate Duty under the English Law.

The levy of Estate Duty of the kind above referred to is not a matter included in any of the Lists in Schedule VII to the Government of India Act, 1935.

Per Zafrulla Khan, J.: In the state of the material made available to Federal Court it is imposible to express any opinion on the questions referred by His Excellency the Governor-General under section 213 of the Government of India Act, 1935.

Per C. J and Varadachariar J.: When Parliament has thought fit to enact section 213 of the Constitution Act, it is not for the Federal Court to insist on the inexpediency of the advisory jurisdiction ; nor does it assist to say that the opinions expressed by the Court on the questions referred will have no more effect than the opinions of the law officers: *Attorney-General for Ontario* v. *Attorney-General for Canada* (1)

Per Zafrulla Khan, J.: The exercise of advisory jurisdiction, even in pursuance of provision made in that behalf in statute, may often be attended with great inconvenience, occasion embarrassment and result in prejudice to the rights of future litigants. It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution.

Per C. J and Varadachariar, J.: The fact that the questions referred to Federal Court relate to future legislation cannot by itself be regarded as a valid objection, as section 213 of the Constitution Act empowers the Governor-General to make a reference when questions of law are "likely to arise".

As the issue of a notification under section 104 of the Constitution Act thereby adding to the Lists in Schedule VII is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists. In this class of cases, the Reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force.

In dealing with such questions as are referred to Federal Court, the Court has to make certain assumptions and reservations in answering them. The necessity for making such reservations may arise in particular cases and the proper course for the Court to adopt in such cases is to make its report with such reservations as may be found necessary: *Attorney-General for Ontario* v. *Attorney-General for Canada* (1).

Per Zafrulla Khan, J.: The Court must be furnished with the fullest material on the subject in an exact and precise form and should not be left

(1) [1912] A. C. 571 (589).

to base its opinion upon assumptions or be reduced to the necessity of safeguarding against misapprehension or misconstruction of what it might have to say by a profuse employment of 'ifs' and 'buts' and 'provideds'. In other words, it should be put in a position to arrive at a determination of the questions referred with confidence that its opinion would furnish some guidance and help. One precaution that might be taken would be to attach to the Reference a draft of the bill which it is proposed to place before the legislature. A draft might be found to be of considerable assistance.

Per C. J and Varadachariar J.: It would make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under section 104 and a draft bill to be introduced to carry out the proposals.

Per Zafraulla Khan, J.: A law enacting that upon the death of a person there should be levied a duty in respect of property upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term 'succession' in that entry.

Whenever the Federal Court is invited to tender an opinion upon questions of law, the questions must be cast in a precise and exact form and the reference itself must contain all the materials necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material comprised in the reference. In determining the true nature of a tax considerable help may be derived from the machinery provisions and the schedules: *Colquhoun* v. *Brooks* (1) and *Rex* v. *Lovitt* (2).

Per C. J and Varadadhariar, J. A perusal even of the machinery section may often be useful and sometimes even necessary to elucidate the scope of the charging section: *Colquhoun* v. *Brooks* (1); *Attorney-General for British Columbia* v. *Mc Donald Murphy Lumber Co.* (3) and *Commissioner of Stamps, Straits Settlement* v. *Oei Tjong Swan* (3)—and this is particularly so in cases of ambiguity: *Provincial Treasurer of Alberta* v. *Kerr* (4).

Per Zafrulla Khan, J.: The Court cannot be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information of the subject of machinery etc which would be necessary to make the duty effective.

In the case of some of the items it would not have been possible to arrive at any conclusion one way or the other in the absence of a draft of the legislative provisions embodying the items.

As regards the point ("The situs of moveable property shall be such as may be specified in the law or prescribed by rules made under the law), it does not turn on the construction of the List in Schedule VII but on section 99 of the Constitution Act. As the validity of such legislation depends

(1) [1889] 14 App. Cas. 493 (507).
(2) [1912] A. C. 212 (223).
(3) [1933] A. C. 378 (389) (4) [1933] A. C. 710 (720)

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upon its conforming to the provisions of section 99 of the said Act, the question does not therefore admit of a general answer. There is nothing in List II of Schedule VII to cover the proposed duty.

Per C. J and Varadachariar, J.: Recognising that there are real and substantial difference between succession and Estate Duties, the word 'succession' used in Entry 56 of List I which speaks of "duties in respect of succession to property" is used in a narrow sense and means transmission by law or by will of men, to one or more persons of the property and the transmissible rights and obligations of a deceased person.

It is not appropriate to describe a levy in the nature of Estate Duty.

With reference to the form of question (1) it is inadequate. It may generally be true to say that questions (1) and (2) correspond to charging sections of the proposed Act; but a perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section.

Assuming that in the absence of material, an affirmative answer could have been returned to the first question as it stands, it would have been extremely difficult to return an answer to the whole of question (2) (a) in the absence of such material.

While it is true that the grant of legislative power in respect of a certain subject matter will carry with it certain accessory or incidental powers, including a power to enact provisions to make effective the exercise of the main power or prevent evasion of the law enacted under that power, provisions of this kind are substantially different from provisions calculated to extend the scope of the main power itself by a statutory fiction. It is bound to be a question of much difficulty—and one which could only usefully be attempted when the legislation has taken much more final form—to determine whether the various provisions set out in question (2) (a) can be regarded as 'incidental' or 'accessory' or 'necessary'.

Special Reference No. 1 of 1944.

Sir Brojendra Mitter (Advocate-General of India) (Mr. S. M. Sadiq, Advocate, Federal Court, with him) instructed by Mr. K. Y. Bhandarkar, Agent for the Governor-General.

Mr. Motilal Setalvad, Senior Advocate, Federal Court (Mr. G. N. Joshi, Advocate, Federal Court, with him) instructed by Mr. K. Y. Bhandarkar, Agent for the Governor-General in Council

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces, (Mr. Baij Nath Sahai, Advocate, Federal Court, with him) instructed by Raizada Sumair Chand Jain, Agent for the United Provinces.

Mr. M. Hidayatullah, Advocate-General of the Central Provinces and Berar (Mr. R. Kaushalendra Rao, Advocate, Federal Court, with him), instructed by Mr. B. Banerji, Agent for the Province of the Central Provinces and Berar,

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August, 25.

Sir Alladi Krishnaswami Aiyar, Senior Advocate, Federal Court (Mr. N. Rajagopala Iyengar, Advocate, Federal Court, with him), instructed by Mr. Ganpat Rai, Agent Amicus Curiae.

The following Opinions were delivered :

OPINION.

Spens, C. J. :—The opinion which I am about to deliver is that of my brother Varadachariar and myself.

This is a Reference made by His Excellency the Governor-General under section 213 of the Constitution Act. The questions referred are :—

"(1) Has the Federal Legislature power to make a law providing that upon the death of any person there shall be levied an Estate Duty in respect of property, other than agricultural land, passing upon the death ?

(2) If the Federal Legislature has such power, has it also the power to make a law providing that for the purposes of the aforesaid Duty—

(a) 'Property passing upon the death' shall be deemed to include—

(i) Property passing either immediately on the death or after a specified interval, either certainly or contingently, either originally or by way of substitutive limitation ;

(ii) property of which the deceased was at the time of his death competent to dispose ;

(iii) property in which the deceased or any other person had an interest ceasing on the death of the deceased, including, in particular, a coparcenary interest in the joint property of a Hindu family governed by the Mitakshara School of Law ;

(iv) property transferred by the deceased as a gift in contemplation of death or within a specified period before death ;

(v) property passing under any settlement made by the deceased whereby an interest in such property for life or any other period determinable by reference to death was reserved to the settlor ?

(b) The *situs* of moveable property shall be such as may be specified in the law or prescribed by rules made under the law.

(3) If the Federal Legislature has not the powers referred to in questions (1) and (2), is the levy of such duties a matter not included in any of the lists in the Seventh Schedule to the Government of India Act, 1935 ?

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(4) If the Federal Legislature has the power referred to in question (1) but not all the powers referred to in question (2), is the levy of a duty on those classes of property mentioned in question (2) in respect of which it has not such powers a matter not included in any of the lists in the Seventh Schedule to the Government of India Act, 1935?

Notice of the Reference was given to the Government of India and to the Provinces and we have heard arguments from counsel for the Governor-General and the Governor-General in Council and from the Advocates-General of the United Provinces and the Central Provinces and Berar. At our instance, Sir Alladi Krishnaswami Aiyar was instructed to appear as *amicus curiae* and present what may be called the tax-prayer's point of view. We are indebted to all the learned counsel for the assistance that they have rendered.

The circumstances in which the Reference has been made and the form of the questions referred have led to some discussion at the Bar as to the proper course to be adopted in this case. Two particular features of the situation are :—

(1) that the questions relate to contemplated legislation and not to the validity or operation of a measure already passed; and

(2) that the main question referred, namely, question (1), contains only very limited information as to the nature of the tax proposed to be levied.

It may be stated at the outset that when Parliament has thought fit to enact section 213 of the Constitution Act it is not in our judgment for the Court to insist on the inexpediency (according to a certain school of thought) of the advisory jurisdiction. Nor does it assist to say that the opinions expressed by the Court on the questions referred "will have no more effect than the opinions of the law officers": *Attorney-General for Ontario* v. *Attorney-General for Canada* (1). That is the necessary result of the jurisdiction being advisory.

The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection. Section 213 empowers the Governor-General to make a reference when questions of law are "likely to arise". It has been urged upon us in the present instance that the reference has become particularly necessary because of a suggestion that the proposed legislation requires to be made possible by a notification to be issued by the Governor-

(1) [1912] A. C. 571, (589.)

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General under section 104 of the Constitution Act. Such a notification can be issued if the subject-matter of the proposed legislation is not enumerated in any of the Lists in Schedule VII to the Act. As the issue of a notification under section 104, thereby adding to the Lists in Schedule VII, is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists and this is what the Governor-General has thought fit to do in this case. In this class of cases, the reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force. We may, however, add that instances were brought to our notice in which references had been made under the corresponding provision in the Canadian Supreme Court Act when the matter was at the stage of a bill.

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It would no doubt make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under section 104 and a draft bill to be introduced to carry out the proposals.

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Hence it is that the form of the questions in this case has caused us greater difficulty. When we deal with the questions themselves, it will be seen that we have been obliged to make certain assumptions and reservations in answering them. As observed in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1) the necessity for making such reservations may arise in particular cases and the proper course for the Court to adopt in such cases is to make its report with such reservations as may be found necessary.

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On behalf of the Governor-General in Council, counsel invited us to answer questions (1) and (2-*a*) in the negative and questions (3) and (4) in the affirmative. This is slightly different from the position taken up in the statements filed on behalf of the Governor-General in Council, but in a matter of this kind, we are not disposed to attach much importance to this circumstance. He contended that nothing like the proposed tax was mentioned in Lists II and III of the Seventh Schedule to the Constitution Act and

(1) [1912] A. C. 571 (589).

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that the only relevant entry in the first list, namely, entry No. 56, could not, on its true interpretation, be held to authorise the levy of the proposed tax. He drew our attention to some of the English decisions in which the distinction between a Succession Duty and an Estate Duty had been clearly indicated and asked us to apply the same test here and hold that the proposed Estate Duty was not a duty "in respect of succession to property" within the meaning of that phrase in entry No. 56. Pressed with difficulties arising out of the meagreness of the information contained in the questions as to the nature of the proposed tax, he contended that the language of questions (1) and (2) was enough substantially to represent the charging sections of the proposed Act, that taken with the description "Estate Duty" in question (1), the questions gave sufficient information for the purpose of the present Reference and that other sections of the Bill would only be machinery provisions. Finally he asked us to express our opinion on the assumption that what was proposed to be levied was a tax similar in all material respects to the Estate Duty imposed in England by the Finance Act of 1894 (and its later amendments) as interpreted and explained by the decisions of the English Courts thereon; and he referred to the observations of Rigby, L. J., in *Earl Cowley's* case (1), and to the decisions in *Winans* v. *Attorney-General* (2) and *Nevill* v. *Inland Revenue Commissioners* (3) as clearly showing that the proposed tax was essentially different from a succession duty and was not therefore covered by the phraseology used in entry No. 56 or any other entry in the lists in Schedule VII.

The Advocates-General of the United Provinces and of the Central Provinces and Berar contended that the proposed tax fell within the ambit of entry No. 56 of List I and that question (1) and even question (2), to a great extent, must be answered in the affirmative. They urged that the term "succession" is one of wide and general import, as comprehensive as the expression "passing upon the death" in question (1) and that there was no justification for limiting its interpretation by reference to the distinction drawn in England between Succession Duty and Estate Duty. This distinction, they said, was merely the result of the history of this group of taxes in England and of the co-existence of the two kinds of duties. They insisted that a constitutional enactment should be liberally interpreted so as to give the fullest scope and effect to the

(1) [1898] 1 Q. B. 355.
(2) [1910] A. C. 27.
(3) [1924] A. C. 385.

language employed and avoid as far as possible an inference of an intention to withhold essential powers of taxation from the Indian Legislatures. They pointed out that when Parliament had thought fit to provide in section 137 that Succession Duty, though collected by the Central Government, should form part of the revenues of the Provinces, it would not be right to attribute to Parliament an intention that this provision could be defeated by levying a similar tax under a different name or on a different basis. Referring to a recommendation made in 1924-25 by the Indian Taxation Enquiry Committee in favour of the levy of Estate Duty in India, they argued that it was unlikely that the power to impose this duty was not conferred py the Constitution Act passed some years after that recommendation. Lastly, they pointed out that writers on Political Economy and Public Finance and several enactments in Canada and Australia used the expressions "Death Duties", "Inheritance Taxes", and duties or taxes on "succession" to include both the Succession Duty and the Estate Duty of the English Law. As regards question (2), they contended that, if the Indian Legislature had the power to levy Succession Duty in the wide sense contended for by them, it must also be held to have the power to enact provisions required to make the exercise of that legislative power effective and to prevent evasions of the taxing statute. Many of the categories in the sub-heads forming question (*2-a*, they said, would, on this principle, be within the competence of the Indian Legislature. In respect of that portion of sub-clause (*iii*) of question (*2-a*) which relates to Coparcenary Interest in Mitakshara joint families, they relied on the judgment of this Court in. *In re The Hindu Women's Rights to Property Act* ( ) as conclusive in support of the view that survivorship is also a form of succession.

Sir Alladi Krishnaswami Aiyar, at one stage, *viz.*, in the case filed by him, supported the contention that "the answer to the first question must be in the negative", because "an Estate Duty as such could not be comprehended within the scope of the power conferred by the item" (*i.e.*, entry No. 56) and there was no other entry in List I or List III capable of being construed as authorising the levy of such a duty. In his statement in reply, he referred to the American, Canadian and Australian decisions relied on by the Government of the Central Provinces in its case and submitted "that it is unsafe to rely on American, Australian or Canadian analogies and that the Court must reach its conclusion on a proper interpretation of the meaning of the expression "duties with res-

(1) [1941] F. C. R. 12; (1941) 73 C. L. J. 415.

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pect to succession" in item 56. During the arguments before the Court, the stated that further examination of the question in the light of the arguments urged on behalf of the United Provinces and the Central Provinces rather inclined him to the view that the word "succession" in entry 56 of List I could, without any undue straining of its significance, be held to include all cases of "passing of property on death" and that the entry could therefore be held to comprehend both "Succession Duties" (in the narrow sense) and "Estate Duties". He instanced the case of a Hindu reversioner being spoken as "succeeding" to the estate on the death of a widow, though the widow had only a "limited interest" and the reversioner has been held not to claim under her. He invited our attention to the report of the Percy Committee (the Federal Finance Committee of 1932) and to the White Paper on Constitutional Reforms (1) where the expression "Death or Succession Duties" is used and he asked us to read it as implying that in the opinion of the authors both the expressions "Death Duties" and "Succession Duties" were of the same comprehensive significance. He reiterated the argument based by the Advocate-General of the Central Provinces on section 137 and he apprehended that if the "Estate Duty" and the "Succession Duty" should be held to be two different duties, there might be practical difficulties and conflicts in their levy in view of the financial scheme adopted by the Constitution Act. We do not feel that the illustration derived from the case of the Hindu widow and the reversioner is likely to be very helpful. The "woman's estate" under the Hindu Law is an anomalous conception created by a long course of decisions in an attempt to reconcile various conflicting interests. Nor is the passage cited from the Percy Committee's Report calculated to throw much light on the question. There is nothing to indicate whether the authors thought that the two duties were one and the same or were different. Anyhow, there remains the fact that the Constitution Act did not employ that composite expression but only the expression "duties in respect of succession" —probably taken from item 2 in List I of the Devolution Rules of 1920. Our conclusion must therefore rest on the weight to be given to the other contentions urged before us.

With reference to the form of question (1), we feel that we are at some disadvantage by reason of its inadequacy. It may generally be true to say that questions (1) and (2) correspond to the charging sections of the proposed Act; but a perusal even of the machinery

(1) Cmd. 4268, 1933.

sections may often be useful and sometimes even necessary to elucidate the scope of the charging section: see *Colquhoun* v. *Brooks* (1); *Rex* v. *Lovitt* (2); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (3) and *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (4)—and this is particularly so in cases of ambiguity: *Provincial Treasurer of Alberta* v. *Kerr* (5). The expression "property passing upon death" in the question might not be inappropriate even to denote cases of succession (in the limited sense) if the other provisions of the Act indicate only a Succession Duty in the English sense. Reference has no doubt been made in the question to "Estate Duty", but it may be doubted whether it is permissible as a matter of interpretation to import into this country, merely from the use of that expression, all the incidents associated with that tax in the English financial system—see the observations in *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (6) as to the connotation of the expression "Estate Duty" used in the Straits Settlements Ordinance considered in that case and as to the danger of using decisions on an Imperial Statute in the interpretation of a colonial measure. See also the observation of Lord Robson in *Rex* v. *Lovitt* (7) where, dealing with the tax imposed by a Canadian enactment, he said: "although called a succession duty, the tax here in question was laid on the corpus of the property". In a Queensland Statute referred to in *Archibald* v. *Commissioners of Stamps* (8), the Queensland Legislature had (as pointed out by O'Connor, *J.*) though adopting the words of the English section, used them in a different context and as part of a different scheme of assessment from that contained in the English Act. As we are not, however, confined strictly to a question of interpretation of the terms used in the Reference and as Counsel for the Governor-General in Council has expressly invited us to give our opinion on the assumption that the tax referred to in the Reference as proposed to be levied is one resting on the same essential basis and having the same essential incidents as Estate Duty in the English Law, we are prepared to express our opinion on that assumption.

(1) [1889] 14 App. Cas. 493.
(2) [1912] A. C. 212.
(3) [1930] A. C. 357.
(4) [1933] A. C. 378, (389).
(5) [1933] A. C. 719 (720).
(6) [1933] A. C. 378.
(7) [1932] A. C. 212 (223).
(8) [1909] 8 C. L. R. 739 (754).

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It is true that the difference recognised in England between the Succession Duty and the Estate Duty is, to some extent, due to the history of those taxes in that country. But it does not follow therefrom that the difference does not also rest on a real and important difference in the bases on which they rest. It is likewise true that in some Canadian and Australian Statutes the expression "Succession Duty" has been employed to denote or to include what would be Estate Duty in the English Law ; but these were instances in which very little turned on the difference between the two kinds of imposts ; the expression was generally found in the "Short Title" of the enactment or taken from it. Similarly the principle of "aggregation" and the principle of "progression" (or graduated scale) associated with the Estate Duty have sometimes been adopted even in respect of Succession Duty ; they cannot, therefore, be made the basis of differentiation between the two. It is also to be noted that though economists and writers have dealt with "Succession Duty" and "Estate Duty" under the headings "Death Duties", "Inheritance Taxes" and "Duties on Succession", it cannot be said that they did not recognise a real distinction between Succession Duty and Estate Duty. There are certain common features justifying the treatment of both these methods of taxation under one head ; but the distinctive features are also noted. Thus Findlay Shirras in his "Science of Public Finance" p. 524 classifies Death Duties or Inheritance Taxes " under two categories, an estate tax levied on the inheritance as a whole, and a succession duty or share tax on the separate portions going to the different beneficiaries". He adds that both categories have their peculiar characteristics and proceeds to indicate them, observing that the Estate Duty is a more productive and efficient source of revenue while the Inheritance Tax may be said to be the more equitable. There is one feature common to both taxes, namely, that the *occasion* for the levy is the death of a person ; but while Succession Duty has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view, the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it. Thus the distinction drawn in the English decisions between Estate Duty and Succession Duty seems to correspond substantially to a distinction in principle and basis recognised by writers on Economics. The Members of the Indian Taxation Enquiry Committee themselves

recognised it; see paragraph 356 of the Report. The judgments in *Provincial Treasurer of Alberta* v. *Kerr* (1) and in some of the earlier cases therein referred to will also show that that distinction may have a material bearing upon the classification of taxes into "direct" and "indirect" and upon the decision of questions relating to the territorial jurisdiction of legislatures imposing such taxes.

The argument based upon the improbability of Parliament having withheld the power to levy such a tax when framing the constitution in 1935 has no great force. Section 104 has been enacted to meet that very difficulty. That section has also some bearing on the argument founded on section 137; the Governor-General may by a notification under section 104 confer the power even on a Provincial Legislature. If, however, the situation cannot be satisfactorily met in that way, the matter must, of course, go before Parliament. As regards the recommendation of the Taxation Enquiry Committee, it seems to us that it must be taken along with the difficulties pointed out in the report itself as standing in the way of the immediate introduction of such a tax into this country. The recommendations made as to the preliminary steps necessary might well have created the impression that it would be some time before the tax could be introduced, if at all.

Recognising that there are real and substantial differences between Succession and Estate Duties, we now address ourselves directly to the question: in what sense is the word "succession" used in entry 56 of List I which speaks of "duties in respect of succession to property". Our attention was drawn to the meaning of the word "succession" in dictionaries and law lexicons and it was contended that the word was capable of comprehending *every* kind of passing of property intended to be comprised in question (1). We are by no means satisfied that this is so. Assuming, however, that the word "succession" by itself is capable of a wide significance, can it bear any such meaning in the expression "succession *to* property", especially when it is read in the light of other indications derivable from the Lists in the Seventh Schedule? The Indian Succession Act broadly divides the subject of "succession" into "testamentary" and "intestate" succession; and the ordinary meaning of succession is the transmission, by law or by the will of man, to one or more persons of the property and the transmissible rights and obligations of a deceased person. That

(1) [1933] A. C. 710.

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this is the sense in which "succession" is used in the Lists in Schedule VII is indicated by the collocation of the words "wills" "intestacy" and "succession" in entry 7 of List III. Entry 21 in List II contains a corresponding provision in respect of "agricultural land"; and it speaks of "transfer, alienation and devolution" (entry 21 corresponds not only to entry 7 of List III but also to entry 8; hence it deals with transfers *intervivos* as well as testamentary dispositions and devolution). It is only reasonable to assume that entry 56 in List I and entry 43 in List II, which authorise the levy of duties in respect of succession, refer us back to the succession and devolution provided for elsewhere in the Schedule. The use of the word "to" in the expression "succession to property" lends some support to this view. How different from this is the concept of a duty which [in the words of Rigby, *L. J.*, in *Earl Cowley's Case* (1)] has no reference to or implication of a relation of predecessor and successor or the existence of a succession. So far as legislative practice is concerned, there can, we think, be no doubt that in England, where the distinctions between the two duties were well-known, a power to impose duties "in respect of succession to property" would be regarded as most inaptly worded if it was intended to include a power to impose an estate duty. If in India there were any conflicting legislative practice, we should not place any great reliance on the English practice. But *if there be any* legislative practice at all in India, it is to be found generally in the use of the word "succession" in the narrower sense. For reasons indicated earlier in this opinion, we do not think that legislative practice in other Dominions or States is relevant for our purpose.

The expression "in respect of" in entry 56 is also not without significance. It indicates that the "succession" is the *subject-matter* of the taxation and not merely the *occasion*. It may be that the amount of the tax is fixed or regulated with respect to the value of the property but the subject-matter of the tax is not the property but the succession. The significance of this distinction is brought out in *Provincial Treasurer of Alberta* v. *Kerr* (2). A tax of which the subject-matter is the "succession" cannot be held to be the same as a tax which "has no relation to the accession to the property of a deceased person"—as the Estate Duty is described by Lord Gorrell to be: *Winans* v. *Attorney-General* (3). It is

(1) [1898] 1 Q. B. 355 (375.)
(2) [1933] A. C. 710.
(3) [1910] A. C. 27, [40].

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perhaps right to add that at the present stage we approach the question only from the point of view of ascertaining the *probable* intention of Parliament. When a Court is called upon to pronounce actual legislation *ultra vires*, the view point becomes slightly different; because, though the intention of the Constitution Act is even then the test, the presumption in favour of validity—weak as it may sometimes be— inclines the Court to put as wide a construction as possible on the words used in the enactment. In our opinion, there is more reason and justification for placing a limited construction on entry 50 of List I than for adopting the wider construction suggested.

Counsel for the Governor-General in Council referred to entry 55 in List I only to say that it is not appropriate to describe a levy in the nature of Estate Duty. We agree in this view; and, as the other counsel appearing before us did not suggest anything to the contrary, we do not think it necessary to discuss the entry at any length. Entry 13 in List III and the cognate entry 51 in List II are equally inappropriate. Both Estate Duty and Succession Duty may be collected in the form of stamps and in some countries legislation relating to Estate Duty and Succession Duty is included in Stamp Laws: but the duties themselves are in their nature different from stamp duties (see Bastable's Public Finance Bk. IV Ch. IX S. 1). The express mention of "duties in respect of succession" in the Lists in Schedule VII is itself an indication that the entry relating to "Stamp Duties" was not intended to comprise duties of the other kind.

If the first question is answered in the negative, it will not be necessary to answer the second question which has been framed on the assumption that the Federal Legislature has power to impose the proposed tax. It seems, however, desirable to make a few observations with reference to the arguments advanced by the Advocate-General of the Central Provinces and Berar in respect of this question. The expression "shall be deemed to include" is the method of introducing a statutory fiction, so as to enlarge the scope of a preceding provision in the statute. While it is true that the grant of legislative power in respect of a certain subject-matter will carry with it certain accessory or incidental powers, including a power to enact provisions to make effective the exercise of the main power or to prevent evasion of the law enacted under that power, provisions of this kind are substantially different from provisions calculated to *extend* the scope of the main power itself by a statutory fiction. It is bound to be a question of much diffi-

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culty—and one which, in our opinion, could only usefully be attempted when the legislation has taken much more final form—to determine whether the various provisions set out in question (2) (*a*) can be regarded as "incidental" or "accessory" in the sense above explained.

The point raised by question (2) (*b*) does not turn on the construction of the Lists in Schedule VII but on section 99. The legislature may, within limits, have the power to define the *situs* of moveable property for the purposes of an Act but the validity of such legislation will depend upon its conforming to the provisions of section 99 of the Constitution Act. The question does not, therefore, admit of a general answer and counsel for the Governor-General in Council did not accordingly invite us to answer this question. There is nothing in List II of Schedule VII to cover the proposed duty.

We are, therefore, of the opinion that the answers to the questions comprised in the Reference are as follow :—

(1) The Federal Legislature has no power to make a law providing for the levy of "Estate Duty" of the nature and with the incidents of Estate Duty under the English Law.

(2) The question does not arise in view of the answer to question (1).

(3) & (4). The levy of Estate Duty of the kind above referred is not a matter included in any of the Lists in the Seventh Schedule to the Government of India Act, 1935.

Our brother Zafrulla Khan finds himself unable to express any opinion on the question referred. A report will, therefore, be made to His Excellency in accordance with the opinion of the majority.

Zafrulla Khan, J. :—Consultation of Judges by the Executive has been the subject-matter of much controversy at the hands of textwriters, jurists and Judges. The attempts made by the first two Stuart Kings of England which were characterised by Sir Edward Coke as "auricular taking of opinions" from the Judges and which eventually led to his own removal from his high office were to a large extent responsible for the bias which is noticeable throughout the judicial history of England against such consultation. These attempts were regarded as interference by the Executive with the proper exercise of their judicial function by the Judges and as tending to undermine their independence. Today the Crown has come to occupy an impersonal and detached position and the independence of Judges has been secured by means

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of such effective safeguards that any suggestion of such a suspicion attaching to a reference made by the Executive to the Judiciary may perhaps be disregarded. That does not mean that the exercise of advisory jurisdiction, even in pursuance of provision made in that behalf in modern statutes, may not often be attended with great inconvenience, occasion embarrassment and result in prejudice to the rights of future litigants. It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution.

That the prejudice against obtaining advisory opinions from Judges is still very strong in England may to some extent be gathered from the protests made in the House of Lords in April 1928 to a clause contained in the Rating and Valuation Bill of that year whereby it was proposed that in certain events the Minister of Health may submit a substantial question of law to the High Court for its opinion thereon. The condemnation of the clause was so vigorous that the Government thought it wise to abandon it. On the other hand, section 4 of the Judicial Committee Act, 1833, (3 and 4 William IV, c. 41), provides: "It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing and consideration of any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear and consider the same; and shall advise His Majesty thereon in manner aforesaid."

Section 60 of the Canadian Supreme Court Act, 1906, empowers the Governor-General in Council to refer important questions of law touching certain matters to the Supreme Court for hearing and consideration. The Supreme Court is bound to entertain and answer the reference, and the opinion of the Court upon such reference is subject to appeal to His Majesty in Council.

The Supreme Courts of the Canadian Provinces and several of the States Supreme Courts in the United States have been invested with similar jurisdiction. The Supreme Court of the United States has consistently refused to pronounce advisory opinions upon abstract questions of law on the ground that to do so would be incompatible with the position that it occupies in the Constitution of the United States.

The Permanent Court of International Justice was invested with competence to deliver advisory opinions by Article 14 of the Covenant of the League of Nations which provided: "The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court

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may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." It has given advisory opinions on several occasions with very beneficient results.

Professor Felix Frankfurter (now Mr. Justice Frankfurter of the Supreme Court of the United States) expressed himself on the subject of advisory opinions on legislative proposals twenty years ago in the following terms :—

"The whole *milieu* of advisory opinions on proposed bills is inevitably different from that of litigation contesting legislation. However much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues. Let any one, for instance, compare the adverse opinion of the Massachusetts Supreme Court upon the constitutionality of municipal coal and wood yards with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on prohibition of trading stamps with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on the State's power to provide for dwelling houses with the opinion of the Supreme Court sustaining such legislation. These are samples taken from the court in which, presumably, advisory opinions have been rendered under the most favourable circumstances."

He concluded with the warning : "It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay (1)".

Writing in 1931, Professor Carleton Kemp Allen expressed himself as follows :—

"The whole notion of 'consultation' of the judiciary is, by hypothesis, a contradiction which requires exceptional justification. The judge does not sit in the seat of justice in order to be consulted, but in order to decide an issue. If, then, he is to be

(1) 37 Harvard Law Review, pp. 1002-1003.

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'consulted', his advice must be one of two things. Either it is mere opinion, subject to the same limitations as any other opinion—namely, that the person advised may or may not, at his option, follow the advice; in this case it is not easy to see the advantage of imposing this additional duty on judges..... .....Or, in the alternative, it is (like the fictitious 'advice' of the Judicial Committee) opinion of such a peculiarly authoritative nature that it is not, and is not intended to be, really opinion at all, but judgment disguised as opinion. There seems to be no cogent motive for extracting opinions from the Bench except to give them an authority which cannot belong to any lesser opinion. If, then, this opinion is really judgment, it is open to the extremely serious objection that it is anticipatory of actual facts, which are of infinite complexity, and upon which all judgment, in the sense of the application of principle to circumstances, must depend..... ....No abstract principle of interpretation laid down in advance by the Courts could be, or at all events ought to be, more than a guide for the decision of subsequent cases. It is therefore either superfluous, or else it is a signpost with a pointing finger in which we may read a gesture, not of direction, but of command or of threat" (1).

In *Attorney-General for Ontario* v. *The Hamilton Street Railway Company* (2), their Lordships of the Judicial Committee in an appeal from Canada declined to answer certain questions with the following observations :—

"They are questions proper to be considered in concrete cases only, and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

The desirability and utility of advisory opinions is supposed to have been stressed by Lord Loreburn in the judgment of the Judicial Committee delivered by him in *Attorney-General for Ontario*

(1) Vol. XLVII, The Law Quarterly Review, pp. 48-49.
(2) [1903] A. C. 524 (529).

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v. *Attorney-General for Canada* (1). A perusal of the judgment however would make it quite clear that in that case the Judicial Committee were concerned (as indeed was bound to be the case) not with the wisdom of the Canadian provision in respect of advisory opinions, but with the question whether that provision had been validly enacted by the Canadian Parliament. The very first sentence of the judgment runs :

"The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorising questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament."

At page 582 of the Report, Lord Loreburn thus sets out the gist of the arguments advanced on behalf of the Provinces :—

"Broadly speaking the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question, whether of law or fact, it was argued, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions ; whereby may ensue not merely distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biased. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced before the Supreme Court has arrived at what will virtually be a determination of their rights."

(1) [1912] A. C. 571 (581).

On this he observes (p. 583) :—

"This view, which was most powerfully presented, has a two-fold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament.....It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada."

Viscount Haldane, *L. C.*, in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1) observed as follows :—

"It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (2). It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Com-

(1) [1914] A. C. 153, (162.)
(2) [1912] A. C. 571.

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mittee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in abstract form without any reference or relation to actual fact, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all questions put to them, and have found it advisable to limit and guard their reply. It will be seen that this is so to some extent in the present appeal."

The view taken by different Lords Chancellor and Judges in the Judicial Committee of the advisability of having recourse to provisions for obtaining advisory opinions on abstract questions of law was revealed by Lord Haldane in the House of Lords during the debate on clause 4 of the Rating and Valuation Bill to which I have made reference earlier. He there said :—

"The Dominion of Canada got into the habit many years ago, before my time, of passing Acts submitting abstract questions for the opinion of the Supreme Court of Canada, and then, by a special clause, to the Privy Council here. The Privy Council was not bound to hear those questions, and said so, but the Privy Council, from the desire to be helpful, did get into the practice of entertaining them, and the King in Council pronounces upon them when they come. I have had a long experience of these questions. I have decided scores and scores of them, and anything more unsatisfactory and more mischievous I do not know.

You get a perfectly general question brought up, without reference to specific facts—or, at least, there are no specific facts which enable you to deal exhaustively with the case ; and than what happens ? I have heard Lord Chancellor after Lord Chancellor say : "We decline to answer the whole of the questions which are put to us. To do so would be to decide ahead, to go into regions which we cannot survey, and embarrass at every turn private litigants who come hereafter " (1).

At a later stage he said :—

"I referred on the last occasion to the liking which had grown up in Canada for submitting abstract constitutional questions to

(1) 70 H. L. Deb., 5 s. Col. 629-30.

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the Courts there and ultimately the Privy Council. In my opinion experience of that course has led to enormous inconveniences, and successive Lords Chancellor have objected to and denounced it. The late Lord Herschell said some strong things about it, and at times refused to give an opinion. The late Lord Loreburn was even stronger, and other Lords Chancellor and other Judges in the Judicial Committee have expressed themselves without restraint upon a system which they deemed to be very mischievous. It was mischievous because it invited the Court to go beyond the particular case which it had to decide and to say things beyond the facts to which the decision would be applied, which might prejudice future suitors" (1).

On the same occasion Lord Merrivale observed :—

"I want to say two or three words more with regard to the position of His Majesty's Judges in this matter. It is no part of the business of His Majesty's Judges, and never has been part of their business, at any rate since the Act of Settlement, to have any advisory concern in the acts of the Administration or to take part in advising the Administration. The natural effect of associating them with the Administration and attaching to them the responsibility for conclusions which are put forward by the Administration will be to weaken the authority of the Judiciary. It can have no other effect.....Why should the Judges be brought in by this side-wind to help the Executive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions that they ought to arrive at upon the law ? (2)."

Lord Carson said :—

"Anything more dangerous or more unfair to the subject I cannot conceive.....I cannot imagine anything worse than for us to lay down that such a procedure should be taken as one which may be applied to many other matters. Just fancy applying it to the Finance Acts—to those complicated measures which raise all the taxes of the country. A case might be submitted to the Judges as to whether under a particular clause certain persons should be taxed, and then, if they were advised that that is not the proper construction, they would be told : 'Oh, you were not there ; we have got judgment ; that is what the Courts say'. Anything more mischievous I cannot imagine" (3).

Nevertheless, in 1935 Parliament thought it wise to incorporate section 213 in the Constitution Act. We must take it, therefore,

(1) 70 H. L. Deb, 5 s. Col. 765.
(2) 70 H. L. Deb, 5 s. Col. 763.
(3) 70 H. L. Deb, 5 s. Col, 804.

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that in the opinion of Parliament, in spite of the criticism to which provisions of this nature had been subjected, it was desirable that the Governor-General should be enabled to refer to the Court questions of law which in his opinion were of such a nature and of such public importance that it was considered expedient to obtain its opinion upon them. It is to be observed that unlike section 4 of the Judicial Committee Act, 1833, and section 60 of the Canadian Supreme Court Act, 1906, section 213 does not make it obligatory upon the Court to arrive at a determination of the questions referred to it: *In re Allocation of Lands and Buildings situate in a Chief Commissioner's Province* (1).

The Court is to report after such hearing as it thinks fit and every report must be made in accordance with an opinion delivered in open Court with the concurrence of the majority of the Judges present with liberty to a Judge who does not concur to deliver a dissenting opinion. Thus the procedure has, as far as possible, been approximated to a judicial hearing and determination of the questions referred.

An advisory opinion on the other hand is not in the nature of a judicial pronouncement and the Constitution Act does not make an opinion appealable to His Majesty in Council. Nor is it binding upon the Governor-General. Whether the pronouncements of the Court in an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of section 212 of the Constitution Act, so as to be recognised as binding on Courts in British India appears to be open to serious doubt. The very fact that the subject of advisory opinions is dealt with in a section later than section 212 is in itself an indication that an advisory opinion would be no more than an opinion. The marginal note to section 213 indicates that the whole procedure merely constitutes "consultation" between the Governor-General and the Court.

Questions that may be referred to the Court for its opinion under section 213 may fall under different categories, with reference to their nature and subject-matter and to the stage at which and the form in which they are referred. It may be that, for instance, in the case of a dispute between the Centre and a Province, questions may be referred that have reference to concrete matters in controversy between the Governments and it may be possible to proceed to their determination against that background. In a case of that description, the Court may not be faced with any

(1) [1943] 6 F. L. J., F. C. 18.

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difficulty having relation merely to the subject-matter or form of the Reference.

The Court has already answered References relating to two enactments, one passed by a Provincial Legislature and the other by the Central Legislature, which shows that where the Court is called upon to deliver an advisory opinion with reference to existing legislation, it might be able to do so, subject to such reservations and qualifications as the nature of the questions referred might necessitate. This is not, however, to be taken to mean that in all cases of completed legislation the Court would be able to deliver an opinion. That must always depend upon the nature of the questions and the material available for their determination.

In the present case we are concerned not with an existing law but with a legislative proposal. That the proposal is of a fiscal nature merely enhances the difficulty of pronouncing upon it in advance. I will not go so far as to suggest that no legislative proposal could usefully form the subject of a reference and opinion under section 213, but I do apprehend that it would be possible for the Court to pronounce upon such a proposal with confidence only in exceptional cases. A reference relating to a legislative proposal must in a large number of cases be enveloped in a thick fog of hypotheses and uncertainties and an opinion delivered thereon could only rest upon a forest of assumptions which must rob it of all value. If a legislative proposal can be cast in a form which does not give rise to difficulties of this character the Court might find it possible to pronounce upon it. In any event the Court must be furnished with the fullest material on the subject in an exact and precise form and should not be left to base its opinion upon assumptions or be reduced to the necessity of safeguarding against misapprehension or misconstruction of what it might have to say by a profuse employment of "ifs" and "buts" and "provideds". In other words, it should be put in a position to arrive at a determination of the questions referred with confidence that its opinion would furnish some guidance and help. One precaution that might be taken would be to attach to the Reference a draft of the bill which it is proposed to place before the legislature. I am not to be understood as suggesting that if such a draft is forwarded, the Court might always find it possible to deliver an opinion, but a draft might be found to be of considerable assistance. It is true that the bill might subsequently emerge from the legislature in a shape very different from that in which it had

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been considered by the Court. In such a case the opinion of the Court will always be read with reference to the proposal placed before it and there will be no danger of its being read with reference to the form which the legislation finally takes. Such a precaution would be wise in the case of all legislative proposals, but I am disposed to regard it as indispensable in the case of fiscal proposals.

With these observations I proceed to the consideration of the Reference now before us. We were informed that a Reference had become necessary at this stage as the Governor-General had been advised that a law of the description envisaged in paragraphs (1) and (2) of the Reference was not covered by any of the entries in the three Lists of the Seventh Schedule to the Constitution Act and that therefore, this was a case in which the Governor-General would have to have recourse to his powers under section 104 of the Act. As this was the first occasion on which such a contingency had arisen, the Governor-General had thought it prudent to seek the opinion of the Court before taking appropriate action. I fully appreciate the considerations that have prompted the Reference, but deplore my inability to answer the main questions propounded on the material made available.

The scheme of the proposed legislation is to levy upon the death of a person a duty in respect of property other than agricultural land passing upon the death. To make the duty effective and to render evasion impossible or at least difficult it is proposed to enact "that property passing upon the death" shall be deemed to include certain kinds of property which might not otherwise have been regarded as passing upon the death. It is further proposed to provide that for the purposes of this duty, the *situs* of moveable property shall be such as may be specified in the contemplated law itself or prescribed by rules made under that law. We are asked whether the Federal Legislature has power to make a law of this description, and if not, is it not a matter which is not included in any of the Lists of the Seventh Schedule ?

The difficulty that I have felt in dealing with these questions may be illustrated by inviting attention to paragraph (2) (*b*) of the Reference. This paragraph put by itself would read as follows : "Assuming that the Federal Legislature has power to make a law providing for the levy of an Estate duty, has it also the power to make a law providing that for the purposes of that duty the *situs* of moveable property shall be such as may be specified in the law or prescribed by rules made under the law ?"

The answer must depend upon the actual provision with regard to the *situs* of moveable property that may be made in the law or that may be prescribed by rules made under the law. In the absence of a draft of the provision itself it would be impossible to say whether the Federal Legislature had or had not the power to enact such a provision. On this being pointed out, it was conceded on behalf of the Governor-General that to this part of the Reference no answer could be given and the Court was excused from attempting to frame an answer.

The main controversy revolved round the first paragraph of the Reference. The contentions raised are summarised in the opinion just delivered by My Lord and my brother and need not be recapitulated here. It was maintained on behalf of the Governor-General in Council that paragraphs (1) and (2)(*a*) of the Reference indicated the real nature of the duty proposed to be levied with sufficient exactness for us to be able to pronounce an opinion upon it. I am unable to accept that position. All that the first paragraph tells us is that upon the death of a person there shall be levied an estate duty in respect of property, other than agricultural land, passsing upon the death. The expression "estate duty" is not a term of art and carries no precise connotation. I was unable to elicit during the course of the argument what purpose the word "estate" before "duty" in the first paragraph was intended to serve, unless it was the psychologic one of directing our minds to the provisions of the English Finance Act of 1894, whereby estate duty was imposed in England. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term "succession" used in that entry.

We were told that the intention was to levy a duty similar in all material respects to the estate duty imposed in England by the Finance Act of 1894 (and its later amendments) as interpreted and explained by the decisions of the English Courts thereon and we were invited to base our opinion upon that assumption. This means that we are to read into the Reference all the essential and material provisions of the English Finance Act of 1894 and all its later amendments as interpreted and explained in the decisions of the English Courts, and further, that whoever seeks to extract any guidance or derive any profit from the opinion that the Court may be induced to deliver on that assumption must at his peril carry

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out a careful study of the whole of the English legislation on the subject and of the very voluminous judicial interpretation thereof. I consider this most unsatisfactory. Whenever this Court is invited to render an opinion upon questions of law, the questions must be cast in a precise and exact form and the Reference itself must contain all the material necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the Reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material contained in the Reference, but that is quite different from varying or supplementing it, which according to their Lordships of the Judicial Committee is not permissible. *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). For instance, the English Finance Act, 1894, levies a duty upon the "principal value" of all property passing upon the death of a person. There is nothing in paragraph (1) of the Reference which indicates that the duty contemplated in the paragraph is to bear that characteristic. We were informed that that was the intention and that we should assume that the duty would be so levied.

It was urged that paragraphs (1) and (2) (*a*) of the Reference would form the charging sections of the proposed legislation and that the nature of the proposed duty should be ascertained from the charging sections. When it was pointed out that the Reference contained no information on the method of assessment and collection of the duty we were told that the machinery provisions could have no bearing upon the nature and character of the duty. With that I am unable to agree. In determining the true nature of a tax considerable help may be derived from the machinery provisions and the schedules, etc. *Colquhoun* v. *Brooks* (2) and *Rex* v. *Lovitt* (3).

In *Attorney General for British Columbia* v. *McDonald Murphy Lumber Company* (4) their Lordships found no difficulty in holding that while a Canadian Act purported to impose a tax on all timber cut within the Province it proceeded in the relative schedules so to reduce the tax by rebate in the case of timber used in the Province as to leave it to operate only on timber exported and that therefore it was in effect an export tax.

(1) [1915] A. C. 363 (369).
(2) [1819] 14 App. Cas. 493, (507).
(3) [1912] A. C. 212, (223).
(4) [1930] A. C. 357.

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In *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (1), Lord Macmillan observed: "It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in so called machinery sections may be called in aid for the interpretation of the charging sections".

In answer to questions whether we could be given an idea of the machinery provisions proposed to be incorporated in the law levying the duty, we were informed that the matter had not yet taken any definite shape, though various alternative proposals had been under consideration. Anybody familiar with conditions in India as compared with those in England would readily appreciate that though the drafting of an Estate Duty Bill upon the model of the English Finance Act of 1894 may not present any serious difficulty so far as the so-called charging clauses are concerned, the devising of the machinery for the assessment and collection of the duty might present insurmountable difficulties. The vast bulk of the people of this country are governed in matters of inheritance and succession by their personal laws and have not the remotest conception of letters of administration, probate and the like. It may therefore well be that though the proposed duty is given the name of estate duty and is levied on "property passing upon death", yet the machinery provisions may perforce have to be so framed as to make the duty in effect a "duty in respect of succession to property" within the meaning of entry No. 56 of the Federal List. I do not think the Court could fairly be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information on the subject of machinery, etc., which would be necessary to make the duty effective.

One of the considerations to which our attention was invited during the course of argument as bearing upon the question whether the expression "succession to property" in entry No. 56 of the Federal List should be given a narrow or wide construction, was that Parliament, which must be presumed to have been well aware of the technical distinction between a succession duty and an estate duty as understood in England, had made no express mention of estate duty in any of the Lists. This, it was argued, went to show that "duties in respect of succession to property" in entry No. 56 must be given a wide and liberal construction so

(1) [1933] A. C. 378, (389).

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as to cover an estate duty. It was urged that Parliament having by entry No. 55 of List I gone so far as to confer upon the Federal Legislature even the power to impose a capital levy it was not to be supposed that it had withheld from that Legislature the power to levy an estate duty. Our attention was directed to section 137 of the Constitution Act which provides that duties in respect of succession to property shall be levied and collected by the Federation but that the net proceeds thereof shall be assigned to the Provinces. It was pointed out that if estate duty was not covered by entry No. 56, List I, and was a matter not included in any of the Lists, Parliament must be deemed deliberately to have left that duty to be allotted at the discretion of the Governor-General to the Provinces or to the Centre and that it was open to the Governor-General by allotting it to the Centre in effect to deprive the Provinces of the benefit of duties in respect of succession to property and thus to defeat the purpose of section 137. Another consequence that would follow would be that whereas even for purposes of collection duties in respect of succession to property had been divided by the Constitution Act between the Centre and the Provinces on the basis of property other than agricultural land (entry No. 56, List I) and agricultural land (entry No. 43, List II), the Governor-General would be at liberty to allot estate duty to the Centre irrespective of the character of the property upon which it might be levied. To this the answer given was that paragraph (1) of the Reference itself showed that it was not proposed to levy estate duty upon agricultural land and that it had already been declared that the net proceeds of the duty would be distributed among the Provinces. The rejoinder was that what was proposed to be done was a mere matter of grace and not a matter of legal compulsion and that it was not reasonable to suppose that Parliament had left these important matters to be adjusted by agreement and not by express provision. The only explanation suggested was that having regard to the conditions that prevailed in India, to which reference has been made earlier, Parliament might have felt that it would be extremely inconvenient, if not actually impossible, to levy an estate duty in this country. That again tends to emphasise the consideration already stressed that though the definition of an estate duty may be retained in the proposed law as set out in paragraph (1) of the Reference, the machinery provisions may have to be devised in such a fashion as to make the duty in substance one in respect of succession to property.

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The material supplied being insufficient to enable me to pronounce an opinion on the first question, it follows that I am unable to pronounce an opinion upon the second and subsequent questions.

I may point out that assuming that in the absence of material of the kind that I have indicated, an affirmative answer could have been returned to the first question, as it stands, it would have been extremely difficult to return an answer to the whole of question (2) (*a*) in the absence of such material. It was contended on behalf of the Provinces that if the subject-matter of the first paragraph was covered by entry No. 56 of List I, the various items set out in paragraph (2) (*a*) could be regarded as merly "incidental" or "accessory" to the main purpose of the duty, designed to make the duty effective and to check evasion thereof. In the case of some of these items at least it would not have been possible to arrive at any conclusion one way or the other in the absence of a draft of the legislative provisions embodying the items. Take, for instance, item (*iv*) which relates to property transferred by the deceased as a gift in contemplation of death or within a specified period before death. A determination with reference to the first part of the item would depend upon the definition of a gift in contemplation of death and with reference to the second part upon the period that may be specified.

In the state of the material made available to us I do not think any useful purpose would be served by my attempting to frame answers to the questions referred. Indeed, I apprehend, that any such attempt might result in the opinion delivered being made the foundation of endless litigation hereafter, apart altogether from any question relating to the *vires* of the proposed law, and operating to the serious prejudice of persons whom it might be attempted to bring within the mischief of that law. It is bound to raise ghosts far more troublesome than any that it might serve to lay. For these reasons I am compelled respectfully to decline to express any opinion on the questions referred.

A. T. M.

APPELLATE CIVIL.

Before Mr. Justice C. C. Biswas and Mr. Justice A. L. Blank.

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THE GANGES MANUFACTURING COMPANY LIMITED.

v.

SRIMATI RADHARANI DASI AND OTHERS.*

Sub-lessee, right of—Rent payable—Purchase in execution of rent decree the leasehold land—Covenant in head lease—Nirikh, *meaning of.*

The covenant in the head lease was expressed thus: "I will not be able to make permanent or periodic settlement of the land covered by the Kabuliyat with any one at a rate of rent (*nirikh*) less then the rate of rent at which it has been settled with me and excepting doing all acts in the said land in exercise of (mourasi) mokarari right, I will not be able to do any act prejudicial to your right. If I commit breach of this covenant, there will be cause of action for recovery of khas possession";

Held, that the covenant was not at all to pay rent, but merely imposed a restriction as regards the terms on which the lessee might sub-let the land.

As a restrictive covenant, the only right of action, if any, which the head lessor had, was to enforce it by injunction to restrain a breach. As against the lessee, the lessor might claim forfeiture upon breach of the covenant.

Obiter: There was no breach of covenant in this case. The word *'nirikh'* means rate of rent and had no reference to the total rent payable under the demise.

Held, that as purchaser of the lessee's interest at the rent execution sale, the lessor would be entitled to realise rent direct from the sub-lessee, but the rent would be the rent which the sub-lessee was liable to pay under his sub-lease, but not that payable by lessee to head lessor.

Matilal Daga v. *Rampada Haldar* (1) discussed.

That the rent settled under the head lease was a consolidated rent and on that basis there was no breach of the covenant.

Appeal by Sub-lessee-Defendant No. 1

Suit for rent as well as for ejectment.

The material facts appear from the judgment.

Messrs. Amarendra Nath Bose and *Pannalal Chatterjee* for the Appellants.

*Appeal from Appellate Decree No. 1687 of 1943, against the decree of M. N. Ghatak Esq., Subordinate Judge of Hooghly, 2nd Court, dated the 2nd of September, 1940, affirming that of Babu Ramesh Chendra Sen Gupta, Munsiff, 1st Court, Hooghly, dated the 21st July, 1934.

(1) (1936) 64 C. L. J. 308.

Mr. Apurbadhan Mukherjee for the Respondents.

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The Ganges Manufacturing Co. Ltd. v. Srimati Radharani Dasi.

August, 30.

The judgments of the Court were as follows :

Biswas, J. :—This is an appeal on behalf of defendant I, the Ganges Manufacturing Company Limited, and is directed against the Judgment and decree of the Subordinate Judge, Second Court, Hooghly, dated September 2, 1940, affirming those of the Munsif, First Court, Hooghly, dated July 21, 1939. Both courts gave the plaintiff, Srimati Radharani Dasi, a decree for rent, refusing the other reliefs for joint or separate possession which she had claimed. The sole question which has been canvassed in the appeal is as regards the rate of rent. The plaintiff claimed it at the rate stipulated in the headlease granted by her, while the defendant company who were in the position of sub-lessees in respect of the disputed tenancy admitted liability at the rate reserved by their sub-lease.

Both side agree that the tenancy is governed by the Transfer of Property Act, and comprises a two annas, two gandas, two Karas and two Krants, that is to say, a 2/15ths share in three plots of niskar land, known as Rudrapara lands, in mouza Bansberia within Police Station Magra in the district of Hooghly. Admittedly the plaintiff was and is owner of this 2/15ths share. On February 21, 1930, she granted a mourashi mokorari settlement of the same to one Anadi Kumar Nandi on taking from him a registered Kabuliyat, *Exhibit I*, and granting to him a registered potta, *Exhibit D*, in corresponding terms. This is the head-lease referred to above and will be referred to as such hereinafter. The grant purported to be in respect of an area of 2 bighas and 15 cottas, representing a 2/15ths share of a total area of 21 bighas which was stated to be the area of the three plots in full sixteen annas share. The consideration was a lump sum selami of Rs. 1,200, and a total yearly rent of Rs. 55 payable in one kist at the end of each Bengali year, which, it was expressly provided, was not liable to be enhanced or reduced on any account. By the lease the lessee was given express power to transfer by way of sub-lease and otherwise, but this was subject to an important reservation that the lessee was not to grant a parmanent or periodic settlement to any one at a "*nirikh*" or rate of rent less than that at which the land had been settled with him, coupled with a proviso for re-entry upon breach of this condition. It is the effect of this restrictive stipulation which falls to be considered in this appeal.

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On April 24, 1922, Anadi Kumar Nandi made a gift of the leasehold to his three sons, and on August 20, 1929, these sons again transferred their interest to one Haradeb Chatterjee, defendant 3. Then, on April 9, 1931, Haradeb in his turn sold his interest to defendant 2, Manoranjan Banerjee. It is not disputed that as a rusult of these successive assignments, the lessee's interest came to be vested in Monaranjan subject to all the conditions and slipulations of the head-lease.

Manoranjan appears to have also acquired the whole of the remaining interest in the Rudrapara lands, and entered into an agreement with the appellant Company to grant them a mourashi mokorari settlement of the entire sixteen annas share in all the three plots. He however, failed to execute the lease, whereupon the company instituted a suit (*T. S. 75 of 1930*) for specific performance of the agreement. On February 6, 1932, the suit was decreed in their favour. Thereafter, on October, 1, 1932, pursuant to the decree, the company got Manoranjan to execute in their favour an indenture of permanent lease in terms of the agreement. This indenture is *Exhibit B.*, and is referred to as the sub-lease in these proceedings, as it really operated as such in respect of the 2/15ths share which was the subject matter of the head-lease, *Exhibit 1.*

By this indenture, *Exhibit B*, the company stipulated to pay a selami of Rs. 26,200 and a total yearly rent of Rs. 366-12-3, the selami and the rent being expressed to have been calculated at the rate of Rs. 1,500 and Rs. 21 per bigha respectively on the total area of the demised lands, which was given, upon actual measurement, as the courts have found, as 17 bighas 9 cottas and 5 Chattaks, as against the area of 21 bighas given, more or less by conjecture, in the head lease. The rent was made payable in four equal quarterly instalments, each instalment being due on the last day of the quarter according to the English calender. It is admitted that the Company paid the selami in full and duly entered into possession.

Meanwhile, it appears, the plaintiff had recovered a decree for rent under the head-lease against Haradeb and Manoranjan for the years 1337 and 1338 B. S. and on April 12, 1933, she herself purchased the leasehold at the execution sale, the sale being confirmed in due course on May 17, 1933.

The plaintiff thereupon claimed to recover rent in respect of her 2/15ths share direct from the appellant company, and actually served upon them a letter of demand, *Exhibit C*, dated September

11, 1934, calling upon them to pay her, and not to Manoranjan, their immediate lessor, the rent due to the extent of such share under their sub-lease. On July 8, 1938, she sent them a second letter of demand, *Exhibit C1*, in which, however, she made the claim, not on the basis of their sub-lease, but at the rate of Rs. 55 per year, with interest on the arrears at 18¾% per annum, as under the head-lease.

On February 4, 1939, the plaintiff then commenced the present action in which she went further and asserted the right to re-enter upon determination of the head lease under the forfeiture clause contained therein. Her case was that Manoranjan had broken the condition whereby the lessee had bound himself not to sub-let the land at a lower rate of rent than that which he had himself agreed to pay. It was alleged that the rent reserved by the head-lease was Rs. 55 per year, whereas Manoranjan had let the land to the Company at Rs. 21 per bigha on a total area of 17 bighas 9 Cottas and 5 Chittaks, which, in respect of a 2/15ths share of that area, worked out at a total yearly rent of Rs. 48-13-9 only, which was less than the head-rent. This, it was said, he was not competent to do, and worked a forfeiture of the lease. The plaintiff accordingly sued for recovery of joint possession of her said 2/15ths share of the Rudrapara lands, or if necessary, for separate possession upon partition. In any event, she maintained that Company were bound to pay her rent at the rate stipulated in the head-lease, and on that basis, she made an alternative claim against them, asking for rent for the years 1339 to 1344 B. S. at the rate of Rs. 55 per year, with interest at 18¾% provided therein.

The appellant Company alone contested the suit. They denied any breach of the restrictive covenant in the head-lease, and also denied the alleged forfeiture, pleading further that the forfeiture, if any, had been waived. As for the alternative claim, their defence was that there was no privity of contract or privity of estate between them and the plaintiff, and they were, therefore, not bound by the stipulations in the head-lease. The plaintiff was accordingly not entitled to rent from them at the rate claimed, but only at the rate of Rs. 48-13-9 per year as provided for in their sub-lease, and that by virtue of her purchase of the leasehold at the rent sale and with effect from after the date of her purchase, namely, from the year 1340 B. S. onwards, the rent for the previous year having been due to Manoranjan, their original lessor.

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The learned Munsif, who tried the suit in the first instance, negatived the plaintiff's right to re-enter, holding that though there was a breach of the forfeiture clause in the head-lease, the plaintiff was still not entitled to enforce forfeiture, firstly, because she had not served any notice in writing as required by section 114A of the Transfer of Property Act, and secondly, because she had waived the forfeiture by her demands of rent under *Exhibits C* and *C1*, and otherwise. The trial Court, however, took the view that as the Company took the sub-lease with constructive notice of the head-lease, the head-lease being in fact one of the documents specifically mentioned in the schedule to their indenture, the Company must be held to be bound by all the covenants of the head-lease, and in that view, made a decree for rent against them at the rate stipulated therein, namely, at Rs. 55 per year, with interest on the arrears at 18¾% per annum. The claim was, however, allowed for the years 1340 to 1344 B. S. only, as contended for by the Company. The rent for the previous year was decreed *exparte* against defendants 2 and 3.

The company appealed but there was no appeal or cross-objection by the plaintiff. The only question before the appellate Court, therefore, was the one which has been agitated before us whether the Company were bound to pay rent to the plaintiff at the rate of Rs. 55 per year as demanded by her, or at the rate of Rs. 48-13-9. per year as admitted by them. On this question, the learned Subordinate Judge took the same view as the trial Court, and in the result, dismissed the appeal with costs. The company have now appealed to this Court.

Both the courts below professed to base their decision on the ruling in *Matilal Daga* v. *Rampada Haldar* (1). The question in that case was whether certain persons who were held to be sub-lessees could be made liable for breaches of covenant contained in the head-lease, seeing that there was no privity of contract or of estate between them and the grantor of the head-lease. On behalf of the sub-lessees there who repudiated such liability, reliance was placed on the case of *Akshoy Kumar Chatterjee* v. *Akman Molla* (2), in which Mukerjee and Beachcroft, JJ., followed and applied what they described as well settled rule of English law. That rule was stated to be that between a head-lessor and a sub-lessee there was neither privity of contract nor privity of estate, and that the sub-lessee could not, therefore, be made

(1) (1936) 64 C. L. J. 308.
(2) (1914) 20 C. L. J. 551 19 ; C. W. N. 1197.

liable for the rent reserved by the head lease or on the covenants contained therein ; and in support of this, reference was made to *Berney* v. *Moore* (1) ; *Holford* v. *Hatch* (2) ; and Halsbury's Laws of England, First Edition, Vol. XVIII, Art. 865. The learned Judges, Mitter and Patterson, JJ., who decided *Matilal Daga's* case *(supra)* (3), however, held that this principle might be applicable in the case of affirmative covenants, but not as regards restrictive or negative covenants, with reference to which the material question was said to be, not whether there was privity between the head lessor and the sub-lessee, but whether the sub lessee took with notice of the covenants.

In the present case both courts found that the appellant company had constructive notice of the head-lease, and relying on the above decision they accordingly held that the rent reserved by the head-lease was binding on the appellants. Apparently, clause 7 of the Kabuliyat, Exhibit 1, was supposed to embody the stipulation regarding rent, and this was treated as a negative covenant so as to attract that ruling.

It seems to us that the Courts below had no clear conception of the nature of the covenant or of the principle which they were seeking to apply. The covenant, according to the translation accepted on both sides, was expressed in these terms :—

" I will not be able to make permanent or periodic settlement of the land covered by the Kabuliyat with any one at a rate of rent *(nirikh)* less than the rate of rent at which it has been settled with me, and excepting doing all acts on the said land in exercise of *(mourashi) mokarari* right, I will not be able to do any act prejudicial to your right. If I commit breach of this covenant, there will be cause of action for recovery of khas possession. ".

The Courts below seemed to think that if the company could be shown to be bound by the covenant in this clause, that would at once place them under an obligation to pay rent in terms of the head-lease. With all respect, this appears to us to betray a confusion of ideas. It was overlooked that the covenant was not at all a covenant to pay rent, but merely imposed a restriction as regards the terms on which the lessee might sub-let the land. To hold that such a covenant was binding on the company could mean no more than that if the company wanted to sub-let, they would be under the same restriction as the original lessee. It could not bind the m

(1) (1791) 2 Ridgeway Parl. Re. 310 (331) ;
(2) (1779) 1 Doug. 183.
(3) (1936) 64 C. L. J. 308.

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to pay the rent which the original lessee had stipulated to pay. In our opinion, therefore, the whole of the attempt made to show that the covenant was binding on the ground of notice, on the authority of *Matilal Daga's* case *(supra)* (1) because it was a negative covenant, was utterly meaningless.

Assuming for argument's sake that clause 7 could be at all read as implying an obligation to pay a specified rent, it would then be a positive or affirmative covenant, and whether the obligation was that of the original lessee or of the sub-lessee, such a covenant, as the Courts below themselves recognise would come within the ruling in *Akshoy Kumar Chatterjee* v. *Akman Molla (supra)*, (2) and it would, therefore, not be enforceable against the sub-lessee, there being neither privity of contract nor privity of estate between the sub-lessee and the original lessor.

It seems to be doubtful if regarded even as a negative covenant, the clause in question could be held to be binding on the company merely on the ground that they had notice. The principle of *Matilal Daga's* case (1) *(supra)* is the same as had been laid down in the well known case of *Tulk* v. *Moxhay* (3), and it does not appear that the covenant here satisfied all the conditions necessary for the application of that principle.

Tulk v. *Moxhay* (3) *(supra)* decided that if a person took land with notice of a restrictive or negative covenant, he would be bound thereby, but such a covenant was to be one restricting the user of the land and for the benefit of land in which the covenantee was interested. That was a case of an assignee, and not of a sub-lessee, and the covenant there was contained in deed of conveyance, by which the purchaser bound himself (and his heirs and assigns) to keep the land sold " in an open state, uncovered with buildings." On the land afterwards passing into other hands by successive assignments, the last assignee was held bound by the covenant on the ground that he had notice of it, and an injunction was granted to restrain a breach. The covenant did not "run with the land" at law, but was held to have that effect in equity on the ground of notice.

The case has been explained and expounded in numerous decisions since. It is sufficient to refer only to a few, which might be regarded as the leading authorities on the subject, where the implications as well as the limitations of the doctrine have been fully

(1) (1936) 64 C. L. J. 308.
(2) (1914) 20 C. L. J. 551 ; 19 C. W. N. 1197.
(3) (1848) 2 Ph. 774.

considered. See, for instance, *Haywood* v. *Brunswick Permanent Benefit Building, Society* (1) ; *London and South Western Railway Company* v. *Gomm* (2) ; *Austerberry* v. *Corporation of Oldham* (3) ; and *Lord Strathcona Steamship Company* v. *Dominion Coal Company* (4). Many of these decisions will in fact be found referred to and relied on in *Matilal Daga's* case (5) *(supra)*.

It is now well established on these authorities : (i) that the doctrine of *Tulk* v. *Muxhay (supra)* (6) applies only to restrictive or negative covenants, (ii) that it cannot be extended to positive or affirmative covenants, such as covenants compelling a man to lay out money or to do any other act which might be called of an active character, (iii) that the covenant must be one restricting or affecting the user of the land, (iv) that the covenantee must have, and continue to have, an interest in the subject matter of the covenant, (v) that the remedy is not a remedy at law by way of specific performence under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant, and (vi) that in deciding whether a covenant is an affirmative or a negative covenant, the Court must look to the substance, and not the form.

As Joyce, J. put it in *South of England Dairies Limited* v. *Baker* (7), the law, in substance, stands thus :

" The original lessor has no right of action against the under-lessee personally for breach of any positive covenant of the lessee's contained in the original lease. The original lessor's remedy in such a case is against the original lessee, who is liable for breach of the covenant. The under-lessee is liable, however, in equity to be restrained from breach of a negative or restrictive covenant contained in the original lease of which he had notice, express or imputed, when the under-lease was granted. "

It is quite clear, therefore, in the present case that there could be no room for application of the doctrine on which the Courts below purported to rely, and there could be no question of enforcing the covenant in clause 7 of the head-lease in the way in which the plaintiff sought to enforce it against the company. As a restrictive covenant, the only right of action, if any, which the plaintiff had was to enforce it by an injunction to restrain a breach. As against the lessee, she might, and did, claim forfeiture upon

(1) (1881) 8 Q. B. D. 403.
(2) (1882) 2 Ch. D. 562.
(3) (1885) 29 Ch. D. 750.
(4) [1926] A. C. 108.
(5) (1936) 64 C. L. J. 308.
(6) (1848) 2 Ph. 774.
(7) [1906] 2 Ch. D. 631.

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breach of the covenant, but rightly or wrongly, as we have seen, this was negatived by both the Courts below.

So far as the claim to rent is concerned, we do not see, therefore, why, the original lease not having been determined, the plaintiff should yet be entitled to treat the company, holding as they did under a valid sub-lease, as if they were her tenants, and not the tenants of the sub-lessor. As sub-lessees, the company will be liable on the covenants in the sub-lease and not on the covenants in the original lease. As purchaser of the lessee's interest at the rent execution sale, the plaintiff would doubtless be entitled to realise rent direct from the company, but the rent would be the rent which the company were liable to pay under their sub-lease.

We may add, though it is not necessary to decide the point for the purposes of this appeal, that in our opinion the rates of rent in the sub-lease was not really in contravention of the terms of the head-lease. As already pointed out, the covenant in the head-lease provided that the lessee shall not sub-let the land at a lower *rate of rent* than that which he had himself agreed to pay. The Bengali word used in the instrument of lease is "*nirikh*", which means *rate of rent*, and had no reference at all to the total rent payable under the demise. No specific rate of rent was in fact mentioned in the document, but if a rate was to be computed at all from the total rent and the total area mentioned, there could be no question, as the learned Munsiff himself observed, that the rate of rent agreed to was Re. 1 per cotta, or Rs. 20 per bigha; and the rate at which the company took their sub-lease was Rs. 21 per bigha, or Re. 1 per bigha higher. On this footing therefore, the plaintiff could have no case either against the lessee or against the sub-lessee. We do not think it is possible to hold that the total rent of Rs. 55 per annum should be taken to be the "rate" or "*nirikh*" stipulated in the head-lease. In our opinion, the rent settled under the head-lease was a consolidated rent, and on that basis, there was and could be no breach of the covenant in question.

The result is that the appeal must be allowed with costs in all Courts. The judgments and decrees of the Courts below are set aside as against the defendants company, and the plaintiff will get a decree for rent against them for the years 1340 to 1344 B. S. only at the rate of Rs. 48-13-9 per year, and this will carry interest at the rate of 12% per annum as stipulated in the sub-lease. The

interest on the decretal amount will be at the rate of 6% per annum. The decree as regards defendants 2 and 3 will stand.

Blank, J.:—I agree.

A. T. M. *Appeal allowed.*

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Before Mr. Justice A. G. R. Henderson

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January, 3.

Suit for contribution—Appeal by one of the defendants—Other defendants, if necessary parties—Appealing defendant, if entitled to any relief—Cross-objection against co-respondent.

The plaintiff in a suit for contribution deposited the arrears of revenue due on a certain Noabad Taluk in order to save it from being sold. He claimed contribution on the basis of the shares owned by himself and the various defendants. The defendant No. 1 alone contested the suit and his case was that contribution should be levied not on the basis of the shares of the parties but upon the assets of the last settlement.

The Trial Court gave the plaintiff a decree as claimed. Defendant No. 1 alone appealed and the other defendants were not made parties to the appeal. The lower appellate Court accepted the contention of defendant No. 1 and remanded the suit.

Held, (A) that the other defendants were necessary parties and (B) that defendant No. 1 could not get any relief in the lower appellate Court in the absence of the other defendants.

Though a cross-objection can usually be taken against an appellant, in certain cases such an objection can be taken against a co-respondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the co-respondent.

*Appeal from Appellate Order No. 200 of 1942 with Rule 1155 (M) of 1942, against the order of Babu Asutosh Das Gupta, Subordinate Judge, 2nd Court, Chittagong, dated the 8th of May 1942, reversing the order of Jagadish Chandra Chakravarty, Munsif, 2nd Court, Chittagong, dated the 4th December, 1941.

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January, 5

Appeal by the Plaintiff.

Suit for contribution.

The material facts will appear from the judgment.

Mr. Prakash Chandra Pakrasi for the Appellant.

Mr. Iman Hossain Chowdhury for the Respondents.

The following judgment was delivered by

Henderson, J. :—This appeal is by the plaintiff. It arises in connection with a suit for contribution. The appellant deposited the arrears of revenue due on a certain Noabad Taluk in order to save it from being sold. He claimed contribution on the basis of the shares owned by himself and the various defendants. The calculation upon which the claim was based was set out in a statement attached to the plaint. There was a further prayer (Ga) to the effect that, if any modification became necessary, the suit might be decreed in accordance with the findings of the court.

The suit was contested by defendant No. 1 alone. He neither admitted nor denied the share which was attributed to him in the plaint. His case was that contribution should be levied not on the basis of the shares of the parties but upon the assets of the last settlement. *Prima facie* it is not very easy to see what this means. His case, however, purported to be based upon the decision of this Court in the case of *Lalmohon Thakur* v. *Nanda Lal* (1). From the judgments of the Courts below it appears that his contention is that the assets of the plots in the possession of the various co-sharers at the time of the last settlement should be estimated and the liability of each co-sharer for the revenue should be in proportion to those assets.

The Munsif gave the plaintiff a decree as claimed. Defendant No. 1 appealed. The Subordinate Judge accepted his contention and remanded the suit. The terms on which the order of remand was made were as follows :

"The suit is sent back to the learned trial Court. The defendant appellant shall produce all the relevant Khatians in which the lands of the noabad taluk have been recorded within such time as may be fixed by the learned Court below and the learned Munsif shall assess the assets in the share of the defendant No. 1 according to the principle which was the basis of fixing the revenue. He shall determine the assets of all the lands in the khas posses-

(1) (1911) 15 C. L. J. 191.

sion of their under tenants of any degree according to the valuations detailed in Ex. F. The liability of the defendants Nos. 1 to 9 shall bear the same ratio to the total liability of the taluk as the assets in the share of the defendants Nos. 1 to 9 thus determined bear to the assets of the entire taluk mentioned in Ex. F. The judgment and decree as against the non-appearing defendants shall stand."

Mr. Chowdhury appearing on behalf of the respondent (defendant No. 1) did not attempt to support the form of this order. There was no prayer by either party for adducing further evidence. The only explanation of the order is that the learned Judge was acting under the provisions of Order 41, rule 27(b) of the Code of Civil Procedure. Though he did not record his reasons, on the view which he took further evidence was undoubtedly necessary. There was, however, no necessity for a remand. The learned Judge should have disposed of the matter himself. Furthermore, the entries in the Khatians are merely presumed to be correct; and that presumption could be rebutted. It would, therefore, only be fair that both sides should be given an opportunity to bring such further evidence as they considered necessary. The practical question therefore is whether the lower appellate court should be directed to proceed further in the matter or whether the decree of the Munsif should be restored.

Two main points have been taken in support of the appeal: (1) that the view of the learned Munsif on the point in controversy between the parties is correct, and (2) that the appeal in the lower appellate court is not in proper form on account of defect of parties.

The dispute on the merits raises an important point with regard to the meaning and effect of the decision on which the respondent relies; but inasmuch as in my opinion the appeal succeeds on the other ground it is not necessary to decide it. As there is nothing to show that the other defendants were aware of this contention or what view they would have taken, if they had been so aware, I shall leave the matter open.

The other defendants did not dispute the plaintiff's method of calculation. The decree has been made against them on that basis and they have not appealed. If the present appeal succeeds there will be an inconsistent decree. There is, therefore, no question that they were proper parties to the appeal and, if an application had been made by the appellant to make them respondents in the lower appellate Court, it would have been bound to

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succeed. As, however, no such application was made it is now necessary to consider whether they were necessay parties or, if they were not, whether the appellant should be given an opportunity to have them made parties.

In my judgment they were necessary parties. The learned Subordinate Judge over-ruled the appellant's contention on the ground that in a suit for contribution the decree has to be executed against each defendant or set of defendants, separately. Hence the decree against the other defendants will not be affected by any modification made on appeal in the decree against the defendant No. 1. This is precisely the reason why they are necessary parties. The point of view taken by the learned Subordinate Judge ignores the real substance of the matter. In the lower appellate Court defendant No. 1 as appellant should be regarded as though he was a plaintiff in order to see whether he can obtain the relief claimed in the absence of the other defendants.

On this point of view it is necessary to examine the plaintiff's case made in the plaint. I have already set out the alternative reliefs which he prayed for. As he was satisfied with the decree made by the Munsiff there was no reason why he should have appealed or filed a cross-objection against defendant No. 1. As soon however as defendant No. 1 appeals, it becomes necessary for the plaintiff to press his alternative case in paragrawh (Ga) against the other defendants.

Although the view generally taken in this court is that a cross objection can usually be taken only against an appellant it has been recognised that in certain cases such an objection may be taken against a co-respondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the co-respondents.

The present case is exactly of that nature. If the appeal succeeds, the basis of the calculation on which the decree against the other defendants has been passed ought to be altered. This can only be done by filing a cross objection, but unless the other defendants are brought on the record the plaintiff is not in a position to press it.

Then in the second place, if an inconsistent decree is allowed to be passed dificulties will certainly arise in the future : for example, if defendant No. 19 makes a deposit and then sues the plaintiff and the other defendants for contribution apart from anything else, difficult questions of *res judicata* will arise. I am there-

fore, of opinion that defendant No. 1 cannot get any relief in the lower appellate court in the absence of the other defendants.

The order of the lower appellate Court must, therefore, be set aside and that of the Munsif restored. Defendant No. 1 will pay the cost of the plaintiff in the lower appellate Court and in this Court hearing fee two gold mohurs.

The question of the basis on which the contribution is to be calculated will be left open.

No order is necessary on the Rule.

R. M. *Appeal allowed.*

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PRIVY COUNCIL.

PRESENT: *Lord Russell of Killowen, Lord Wright, Lord Porter, Sir George Rankin and Sir Madhavan Nair.*

VALARSHAK SETH APCAR

v.

THE STANDARD COAL COMPANY, LTD AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL].

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May, 13.

Brokerage—Employment for introduction to prospective buyer—Subsequent contract, if fruit of introduction—Witness, credibility of—Probability, estimate of.

A broker who is employed by a seller to introduce him to a prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have as a result of the introduction been brought into business relationship by means of a contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit not of the introduction, but of the satisfactory business relationship which the introduction established.

A trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought, or with reckless glibness. He alone could form a reliable opinion as to whether the plaintiff had emerged with credit from cross-examination.

As a rule it is wrong to justify an estimate of probability by an ultimate issue of events.

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Privy Council Appeal No. 24 of 1942, from the decision of the High Court of Calcutta (Derbyshire C. J. and Mc Nair J.), dated the 28th February, 1941, reversing a decision of Lort Williams, J, dated the 8th August, 1939.

The material facts appear from the judgment of their Lordships.

Sir Thomas Strangman and *J. M. Pringle* for the Appellant.

F. Wispart and *W. W. K. Page* for the Respondents.

Their Lordships' judgment was delivered by

Lord Russell of Killowen :—This is an appeal from a judgment and decree of the High Court at Calcutta in its Civil Appellate Jurisdiction (dated the 28th February, 1941), which reversed a decree of the Court in its Ordinary Original Civil Jurisdiction (dated the 8th August, 1939) pronounced in an action in which the plaintiff (now the appellant) sued the four respondent coal companies to recover brokerage. The trial Judge (Lord-Williams, J.) gave the plaintiff the relief which he sought, but on appeal the Chief Justice and Mc Nair, J. dismissed the action.

The case is one of difficulty in that the rights of the parties depend upon happenings which took place many years ago, *viz.*, at the end of the year 1919 and early in the year 1920, while the action was tried in the year 1939, and the truth has to be ascertained from the documents and the recollections of three witnesses, *viz.*, the plaintiff, whose evidence was given in the witness-box before the trial Judge, and two witnesses for the defence whose evidence was taken on commission in England in the month of October, 1938. A feature peculiar to the case is this :—That while the trial Judge who saw the plaintiff, heard him give his evidence and was in a position to observe his demeanour as a witness, accepted him "as an honest and straightforward witness with a good memory for main facts, but as might be expected after such a lapse of time, not for dates or minor details," the High Court on appeal rejected the trial Judge's opinion thought the plaintiff lacking in candour, and disbelieved his evidence.

Some facts, however, are not in dispute. The plaintiff was in the year 1919 a well known coal broker who carried on business in Calcutta. The four respondents were well-known coal companies, whose managing agents were Heilgers & Co. The coal department of that firm was in charge of a Mr. Wills. In 1918 there had come into existence a limited company called the Indian Iron & Steel Company, Limited (hereinafter referred to as the

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Steel Company) whose managing agents were Burn & Company, in which firm a Mr. Fairhurst was a partner. The Steel Company in December, 1919, had not yet started operations, but it was making or contemplating making forward contracts for coal, hoping at that time to be able to start operations in or about the year 1921. The plaintiff called on Fairhurst on the 1st December, 1919, and having verified from Fairhurst the fact that the Steel Company was contemplating the purchase of coal, told Fairhurst that he knew a seller. It was arranged that he would bring the sellers in. On the following day the plaintiff called on Wills, and told him he could introduce him to a buyer of coal, and at Wills's request he took Wills round to Burn & Company's office and introduced him to Fairhurst. Terms were then discussed, the price being 8 annas above railway rates with a minimum of Rs. 4-8 per ton. On the following day (December 3rd) Wills told the plaintiff to tell Fairhurst that he was willing to make a contract for 20 years for the sale of from 12,500 to 15,000 tons monthly. The plaintiff reported this offer to Fairhurst. The plaintiff took no part in negotiating the terms; as Wills said, the plaintiff took him to the buyer, that was all he did. Fairhurst and Wills agreed in terms which were eventually incorporated in a formal contract executed by the Steel Company and the four coal companies. The date on which the contract was to come into operation was postponed from time to time, but eventually in the formal contract the date was fixed as the 1st April, 1923. By this contract the coal companies agreed to sell and the Steel Company agreed to buy 15,000 tons of coal monthly for a period of 20 years at 8 annas above State Railways rates, with a minimum price of Rs. 4-8-0 per ton.

In fact, unknown to the plaintiff, on the same 29th April, 1920, there was executed a second contract between the four coal companies and the Steel Company coming into operation on the 1st April, 1923, for the sale during 20 years of 20,000 tons of coal monthly at the same price and in other respects on the same terms as the price and terms contained in the other contract between the parties.

The plaintiff, after he became aware of the execution of this second contract, and that deliveries were being made under it, brought his action claiming brokerage commission thereunder as being a contract which resulted from his introduction of seller to buyer.

Upon those facts the plaintiff would appear *prima facie* to be entitled to whatever is the usual commission; for there can be

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little doubt that these two contracts executed at the same time resulted from the introduction. No legally binding relationship existed between the parties until the 29th April, 1920, and then the two contracts are simultaneously brought into being, constituting for the first time a binding relationship between the buyer and seller who had been brought together by the broker.

The issue between the parties can now be stated. The defendants allege that the plaintiff was not employed as a broker to introduce a buyer of coal generally, but was employed as broker for one specific transaction only *viz.*, to introduce a buyer who could enter into a contract to buy 12,500 to 15,000 tons of coal monthly, and that the only commission to which he is entitled is a commission due in respect of the first contract.

It will thus be seen that acute conflict exists as to what took place between the parties in the early days of December, 1919, which necessitates a close consideration of the oral evidence of the plaintiff, and Messrs. Wills and Fairhurst, and the documents available, as well as of the course of events which led up to the execution of the two contracts.

The plaintiff maintained throughout his evidence that in his first interview with Fairhurst a large monthly tonnage was mentioned, and that when he spoke to Wills of a possible buyer it was in connection with a large monthly tonnage. The figure stated by him in his evidence was 40,000 to 50,000 tons. On the other hand Fairhurst said that he told the plaintiff that they wanted about 15,000 tons; while Will's evidence was that having looked at his records he saw that he was not in a position to contract to supply more than from 12,500 to 15,000 tons monthly; and that he instructed the plaintiff to make an offer to Fairhurst of 15,000 tons.

It is upon this issue that the Appellate Court reversed the findings of fact of the trial Judge, and held that the plaintiff "introduced Wills to Fairhurst for the specific purpose of effecting the sale of about 15,000 tons of Coal, and once that sale was effected he had earned his brokerage and was not entitled to any further remuneration, however many contracts the parties might conclude." They treated the plaintiff as a witness whose testimony should not be believed, and accepted as accurate the evidence of Fairhurst and Wills.

In their Lordships' opinion the High Court on appeal was not justified in this case in taking a different view of the plaintiff's credibility from that adopted by the trial Judge. Mc Nair, J., enumarates a series of points upon which he bases his view that

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the plaintiff's evidence is such that reliance cannot be placed upon it, but they are just the sort of points as to which the only person who can effectively form an opinion and draw conclusions is the trial Judge who has the witness before him. He alone knows the demeanour of the witness ; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness. He alone could form a reliable opinion as to whether the plaintiff had emerged with credit from a cross-examination lasting the greater part of two days, which was to a great extent repetitions, and sometimes offensive.

Their Lordships' own opinion of the plaintiff's credibilit formed after careful consideration of the whole evidence, agrees with that of Lort-Williams, J. They think that making all due allowances for the effect on memory of the lapse of time, the plaintiff's story is in all main respects true and reliable.

Whether the plaintiff mentioned the actual figures of 40,000 to 50,000 tons, seems of small importance compared with the real issue, *viz.*, did he bring Wills into touch with Fairhurst as with a person likely to be a large purchaser of coal, or did he merely bring them together for the sole purpose of effecting one single transaction, *viz.*, a sale and purchase limited to 15,000 tons ?

What are the probabilities ? It is certainly not improbale that the agent of a new company like the Steel Company, even though its immediate requirements were restricted, should hint at future expansion and the possibility of larger requirements ; nor is it improbable that Wills, while cautious as to his order at the time, should hope for or anticipate larger volume of business thereafter. "He told me," says the plaintiff, "that he could at the moment offer 15,000 tons." While as a rule it is wrong to justify an estimate of probabilities by the ultimate issue of events, the circumstances of this case are so remarkable that they seem to afford a strong test whether the rule does not in this instance admit of an exception.

What are the facts ? That simultaneously with the execution of the first contract, there was executed a further contract for 20,000 tons, on identical terms, is common ground. The estimate of probability is certainly justified by the result ; but the respective dealings and conduct of the contracting parties during the period

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which elapsed between the introduction by the plaintiff and the execution of the contracts, must now be considered.

First, as regards the coal companies. Wills was in negotiation with the Tata Iron & Steel Company, Limited (hereinafter referred to as Tata's) for the renewal of a 25 years' contract for the supply of 30,000 tons of coal monthly, but only at Railway rates with a minimum price of Rs. 3-12-0 per ton. Tata's were old customers of the coal companies, and before the incorporation of the Steel Company, were the only steel manufacturers on a large scale in India. A contract on those lines Wills was prepared to recommend to the coal companies but that was before he had heard of the Steel Company as a purchaser and had secured his introduction to Fairhurst. On or about the 5th December, 1919, he received a letter from Tata's agent (Tutwiller) stating that Tata's were agreeable and asking for a draft contract on the above lines. In the meantime Wills had come to terms with Fairhurst at the larger price, subject of course to the approval of their respective boards. It is true that Fairhurst had somehow got to know of Tata's price, and had suggested that the Steel Company ought not to pay more; but on the 4th December Wills told Fairhurst by a letter of that date (with how little truthfulness can now be seen) that Tata's had offered the larger price, and that he could not meet Fairhurst on the point. On the 8th December, Fairhurst wrote to Wills confirming the proposed contract to purchase 15,000 tons monthly at the larger price, commencing from April, 1921.

On the 19th December, 1919, Board meetings of the four coal companies were held at which the proposed contract with the Steel Company was approved. On the 20th December, 1919, Wills wrote to Tutwiller offering to negotiate a 20 years contract for 25,000 tons monthly at the larger price, an offer which was promptly refused. From that time, as Wills admits, Tata's were off, and a large monthly quantity became available to sell to the Steel Company. That a further dealing between Fairhurst and Wills had already been mooted is clear from a letter written by Wills to Fairhurst on the 2nd January, 1920, which contains the following passage:—"Regarding the further quantity you were requiring can you now come to a decision on this point? You informed me on the last occasion I saw you, you thought you could do something towards the end of February. My trouble is I have other long contracts pending and I must decide one way or the other by this time next week." To this Fairhurst

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replied on the next day:—"Regarding further quantities I am sorry we shall not be in a position to fix for more, until near the end of February, and I hope you can hold the matter over till then." A few days later Fairhurst suggested that the Steel Company should be given an option to purchase 20,000 tons monthly over a period of 20 years at 4 annas above Railway rates, or (if with an option to extend the contract for a further 20 years) at 8as. above Railway rates; the contract to run from April, 1923. The option was given (and accepted) at 8 annas above Railway rates, but with no power to extend the contract beyond the 20 years.

The dealings and conduct of the Steel Company during this period must now be considered. It is obvious from the letters of the 2nd and 3rd January, 1920, that Fairhurst (who was a director of the Steel Company) had since his introduction to Wills contemplated the likelihood of his company requiring to purchase further quantities of coal, and had so informed Wills. They had discussed the matter some time or times before the 2nd January, 1920, but exactly when or how often is left undetermined. The letter of the 2nd January, 1920, certainly suggests more than one occasion. Fairhurst however could not "fix" anything until near the end of February for reasons which the minutes of the Board meetings of the Steel Company directors make clear.

The Steel Company was still in its opening stage. Its initial plant was still in course of erection, indeed delays had occurred which had necessitated the postponement of the operation of the 15,000 tons contract to April, 1922. The coal contracts already negotiated provided enough for the initial plant. But the company was not to rest content with business on that scale, its ore reserved had been proved to be sufficient for not less than 100 years. A scheme was accordingly being considered, and worked out by the managing agents, which involved an increase of the company's capital by 15,000,000 rupees, the acquisition of two more blast furnaces, foundery plant, etc., and as a consequence the securing of forward contracts for the purchase of large quantities of coal. A Board meeting was held on the 13th January, 1920, at which the managing agents brought forward their proposal. They pointed out that they were in a position to purchase the best cooking coal sufficient for doubling the size of the plant for 20 years ahead (this Fairhurst admitted referred to his discussion with Wills as to further sales); and that it was advisable to increase production while exchange was high, and plant could

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be purchased at low cost. The proposal was sanctioned, and directions were given for the summoning of an extraordinary general meeting of share-holders for the purpose of increasing the company's capital.

The reason why, notwithstanding Fairhurst's willingness to purchase and Wills's desire to sell further coal, Fairhurst was not "in a position to fix for more until near the end of February" is now apparent ; first the directors and then the share-holders had to be consulted, and these things take time. All went well, however, and on the 1st March, 1920, Burn & Company wrote to Heilgers exercising the option. Meanwhile the actual terms of the 15,000 tons contract had been settled between the parties, and these *mutatis mutandis* were to apply to the 20,000 tons contract. The two drafts were engrossed and the engrossments were duly executed on or about the 29th April, 1920.

Prima facie it is difficult to dissociate the two contracts, or to imagine that when the representatives of the buyer and seller had been brought together, the prospect of large dealings had no place in the contemplation of either. Fairhurst however, alleged that it was not so, because (he said) the scheme which involved these large purchases by the Steel Company had not entered the mind of anyone until some date after the 20th December, 1919. It is difficult to believe, in regard to a scheme of this magnitude, that it can have been conceived, worked out, and adopted all within so short a period. The trial Judge felt unable to accept this evidence, and their Lordships feel the same difficulty. The olny reason given by Fairhurst for his allegation shows that he has no real recollection about the matter, because he first purported to rely on a letter of the 20th December, 1919, (which was not forthcoming), and ultimately when pressed said "what fixes it so definitely in my mind is that at the time I negotiated the 15,000 tons contract I did not want any more". In the same way Wills, when asked when he first knew that the Steel Company required a further quantity of coal, bravely answers. "Subsequently to the 20th December. It is in the correspondence ; and when pressed why he says after the 20th December, his reply is "Because there are no other letters here." This witness also has clearly no recollection independently of what he sees in the correspondence ; and the correspondence is of no assistance on this head, except to show that the prospect of further orders from the Steel Company had been under discussion sometime before the 2nd January, 1920.

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In their Lordships' opinion the trial Judge was right in accepting the evidence of the plaintiff (whose recollection and truthfulness he had the opportunity of judging) in preference to the testimony of witnesses which proved to be based on some correspondence which on examination failed to justify it.

Much stress was properly laid by Counsel for the respondents on the fact that the plaintiff in sundry letters written before action had made no mention of the large figures to which he testified in his evidence. That is true; and indeed he claimed at first under a contract which had been executed, securing his commission in respect of the 15,000 tons contract. On the other hand, the respondents in refusing to admit his claim, based their refusal on wholly untenable grounds. They alleged that he was entitled to commission in respect of the first contract because he had negotiated it; but that he was not entitled to commission in respect of the second contract, because it was made between the parties direct, without any negotiation by him. In truth, he negotiated neither contract. What he did was to introduce a seller to a buyer.

It is not until the matter is thrashed out and the evidence taken, that the true legal position emerges.

A broker who is employed by a seller to introduce him to a prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have as a result of the introduction been brought into business relationship by means of a contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit not of the introduction, but of the satisfactory business relationship which the introduction established.

No such question can arise in the present case. There was no binding business relationship established between the parties until the 29th April, 1920, when at the one time, the two contracts in identical terms, and each the result of the introduction in the previous December were executed by the respective parties. Indeed, that the second contract was as much a result of the introduction as was the first is undeniable, and such was the view of both Courts.

Their Lordships are of opinion that the plaintiff was not employed by Wills merely to find a purchser for a specified

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quantity of coal. Wills did not send for the broker. The broker came to him with an offer to introduce a purchaser, and Wills employed him to effect the introduction. This the plaintiff did, and thus became entitled to the usual commission upon the two contracts which resulted from that introduction. What is the usual commission is not in dispute; it is 1 anna per ton on all delivered and paid for under the contracts.

This appeal should accordingly be allowed.

Their Lordships desire to add some further observations. The trial Judge was not in their opinion justified in stating that two separate agreements were drawn up with the intention of concealment, and avoiding a claim to commission in respect of the 20,000 tons. The evidence does not they think justify this view. Two agreements were advisable and were justified by the fact that as originally drawn they commenced to run from different dates; and it was only by reason of an eleventh-hour alteration in the engrossment of the first contract that the commencement dates coincided. Although at first sight the double transaction bears an appearance of questionable behaviours, their Lordships are satisfied that no one concerned acted with any intention of depriving the plaintiff of anything to which he was entitled. Their Lordships also fully appreciate the difficulties under which both Fairhurst and Wills laboured in having, after the lapse of so many years and after a long retirement from business, to give evidence as to one of their many transactions with their various customers. They were, their Lordships feel no doubt, witnesses who were anxious to speak the truth, but they were necessarily in the main dependent upon their previous perusal of such documents as were available.

Reference has been made above to an agreement which was prepared and executed, securing to the plaintiff his commission in respect of the first contracts, and was executed at the end of May, 1920. After reciting (contrary to the fact) that the plaintiff had negotiated the first contract, the defendants thereby covenanted in consideration of the premises to pay him brokerage at the rate of one anna per ton on all coal which should be actually delivered and paid for under the first contract or any agreement substituted therefor. The terms of this document no doubt suggest that his right to commission rests on his services as a negotiator and not as the introducer of a purchaser; but he accepted the document in complete ignorance of the second contract, believing as well he might that the document gave him all he was then enti-

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tled to. There is nothing in the document really inconsistent with a claim to commission on any other contract which resulted from his introduction. It may, however, be pointed out that the fact that this special formal agreement was adopted, appears to be inconsistent with the suggestion that the plaintiff was merely employed by a seller of coal as a broker to negotiate and obtain a particular contract for the purchase of a specified amount of coal. If such had been the case the transaction would normally, according to the evidence have assumed the form of a sold note, under which a commission specified on its face, would have been payable to the broker.

For the reasons indicated their Lordships are of opinion that this appeal should be allowed. The decree of the 28th February, 1941, should be discharged and the decree of the trial Judge restored but with this alteration, that in place of the declaration therein contained there be substituted a declaration "that the plaintiff is entitled to remuneration at the rate of one anna per ton in respect of all coal delivered and paid for under the said contract subsequently to the said 30th day of June, 1939." They will humbly advise His Majesty accordingly. The respondents must pay the appellant's costs of the appeals to the High Court and to His Majesty in Council.

Sanderson, Lee & Co., : Solicitors for the Appellant.
Withall & Withall : Solicitors for the Respondents.

A. T. M. *Appeal allowed*

APPELLATE CIVIL.

Before Mr. Justice R. C. Mitter and Mr. Justice A. L. Blank.

JOY CHAND SEROGI AND ANOTHER
v.
DOLE GOBINDA DAS AND OTHERS.*

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December, 3, 4, 6, 7, 14, 15, 16, 17, 20.

Re-imbursement—Co-debtors—Principle stated—Contract Act (IX of 1872), section 69—'Bound by law to pay'—Equity—Benami transaction—Proof—Civil Procedure Code (Act V of 1908), section 11.

The principles applicable to those of contribution between two co-debtors are applicable to a suit for re-imbursement as the only difference between

*Appeal from Original Decree No. 147 of 1941, with Cross-objection, against the decree of S. Chatterjee Esq., Subordinate Judge of Murshidabad, dated the 28th February, 1941.

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them is that in the former case one discharges his as well as another's liability and in the latter case he discharges the liability which is wholly the other's not voluntarily but under conditions which give him legal right to recoup himself.

Those principles are: (A) The release of one of the debtors by the creditor does not prevent the other debtor who has satisfied the debt from claiming contribution form the released debtor: *Perumall Pillai* v. *Ram Chettiar* (1) and *Shoh Ram Chand* v. *Pandit Parbhu Dayal* (2).

(B) The dismissal of the creditor's suit against one of his co-debtors will not bar the debtor against whom the decree was passed from claiming contribution from his co-debtor against whom the suit was dismissed, if he either satisfied the decree or the decree was satisfied by execution levied against his property: *Abraham Servai* v. *Raphial Muthiriano* (3) and *Behari Lal Sen* v. *Indra Narayan Bandopadhya* (4).

The words "bound by law to pay" in section 69 of the Indian Contract Act include not only personal liability of the "other" but also liability on his property even when he was under no personal liability to pay: *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (5) followed.

Gangadas Bhattar v. *Jogendra Nath Mitter* (6) and *Dolegobinda Das* v. *Chattur Buj Serogi* (7) distinguished.

Boja Sellappa Reddy v. *Vridhachala Reddy* (8); *Subramanya Chetty* v. *Mahalinga Sami Sivan* (9) and *Puthirpurayal* v. *Mangalasseri* (10) dissented from.

Statutory provisions cannot be controlled by or whittled down by the general principles of equtiy, justice and good conscience. Those principles can have application in India on the field outside statutory provisions. If there is a statutory provision on the subject, the plaintiff would succeed or fail according as his case satisfies or fails to satisfy the statutory requirements. If his case comes within section 69 of the Indian Contract Act he is entitled to succeed and cannot be denied relief by taking the aid of general maxims of equity.

In order to satisfy the plea of res judicata under section 11 of the Civil Procedure Code, the point in issue must relate to the rights of parties to the suit. The determination of those rights may depend upon the determination of facts as well as on points of law. What the rule of *res judicata* bars is the re-agitation between the self-same parties or their privies, of the self-same issue, which was directly and substantially in issue between them in the previous suit.

(1) (1917) I. L. R. 40 Mad. 968 (975) F. B.
(2) [1942] I. L. R. All. 605 (620); (1942) 47 C. W. N. Pat. 1 (7) P. C.
(3) (1914) I. L. R. 39 Mad. 288.
(4) (1927) 45 C. L. J. 571; 31 C. W. N. 985.
(5) (1878) I. L. R. 4 Calc. 369 (373).
(6) (1907) 11 C. W. N. 402.
(7) Unreported.
(8) (1907) I. L. R. 30 Mad. 35.
(9) (1909) I. L. R. 33 Mad. 41.
(10) (1914) 24 Mad. L. J. 548.

The apparent state of things must be presumed to be real and he who alleges Benami must in the first instance adduce such evidence as would rebut that presumption.

Where the parties are husband and wife, the fact of possession of property and of title-deeds would afford no certain criterion on the question of Benami. The fact that rent receipts were issued in the name of wife or that she figured as plaintiff in rent suits against the tenants or that the record of rights showed her name as the owner, would not also be of much importance, for those circumstances would be in accordance with Benami usage. The apparent state of thing would ordinarily be kept up. The material point for consideration would be as to who paid the price and the conduct of the parties The fact that it is a common practice in Bengal for husbands to acquire property in the Benami of their wives and that husband had in the past employed his wife as Benamidar, would be matters for consideration, but by themselves they would not establish that the property was acquired by husband in the Benami of his wife.

Appeal by the Plaintiffs.

Suit for reimbursement.

The material facts appear from the judgment.

Messrs. Atul Chandra Gupta and *Rabindranath Bhattacharjee* for the Appellants.

Messrs. Ramaprosad Mookerjee, Muktipada Chatterjee and *Binayendra Deb Rai Mahasai* for the Respondents.

C. A. V.

January, 28.

The following judgment was delivered :

The facts of the case, which are material for this appeal, are as follows :-

Four annas share of Touzi No. 199 of the Murshidabad Collectorate belonged to Nawab Bahadur of Murshidabad, as *mutwali* of a *wakf* estate. In August, 1901, he as *mutwali* settled the same in *patni* right to Daiba Kumari Debi and others, the executors to the estate of Indra Narayan Singh at an annual rent of Rs. 2,369. For brevity's sake this *patni* would hereafter be called the " four anna *patni* ". The said executors in their turn settled the same in *darpatni* right to Tarini Prosad Dhur at an annual rent of Rs. 2,369-0-0 on the 29th April, 1905. This *darpatni* would for brevity's sake be hereafter called the " Four anna *darpatni* ". There was a covenant in the *darpatni kabuliyat* (Exhibit 11) by which the *darpatnidar* undertook to pay by *barat* the *patni* rent to the Nawab Bahadur of Murshidabad. Tarini Prosad Dhur in his turn granted three separate *sepatnis* to three persons at different dates of different portions of his *darpatni* lands. One of such *sepatnidars* was Adhar Chandra Mondal. He did not, however, grant *sepatnis* in respect of all the lands of his *darpatni taluk* but retained a portion thereof in

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khas management. After his death his heirs, Bishnu Das Dhur and others granted on the 1st September, 1923, all those lands of the *darpatni*, which their father had held in *khas*, in *sepatni* to Joy Chand Serogi, Keshori Mull Serogi and Chatturbhuj Serogi by taking a large amount of money as *selami*. Thus, after this grant all the lands of *darpatni* were let out in *sepatni* right to four sets of persons. The total rent of all the four *sepatnis* came up to Rs. 2,256-9-0. It was thus less than the *darpatni* rent (Rs. 2,369) payable by the heirs of Tarini Prosad Dhur to the *patnidar* Daiba Kumari Debi and others. This loss was made up by those persons from the *patni* which they had in respect of the other twelve annas share of the said Touzi which was owned by the executors of Indra Narayan Singh. This *patni* would hereafter be called the "twelve anna *patni*." It is not necessary for this appeal to narrate the history of the said *patni* of the twelve annas share of the said Touzi or the *darpatnis* carved out of the same.

On the 8th Falgoon, 1330 (= 21st February, 1924), the heirs of Tarini Prosad Dhur sold their aforesaid "four anna *darpatni* and their twelve anna *patni*." The name of defendant No. 2 Nerode Barani Dasi who is the wife of defendant No. 1, Dolegobinda Das appeared as the purchaser in the conveyance. On the 5th Kartic 1336 (= 20th October, 1929), Nirode Barani Dasi sold the "twelve anna *patni*" to Amano Burmaniya. There thus remained with her the unprofitable "four anna *darpatni*." On the 6th February, 1929, the "four anna *patni*" was purchased by Sardi Bai, wife of plaintiff No. 1, Joy Chandra Serogi. The finding of the learned Subordinate Judge is that Sardi Bai was the *benamdar* of her husband Joy Chand Serogi and that finding has not been challenged before us by any of the parties. At a partition between Joy Chand Serogi and his brother Kishorimull Serogi, the interest of Kishorimull in the *sepatni* which they and Chatturbhuj Serogi held under the four anna *darpatni* fell to the share of Joy Chand Serogi. This partition was after the 15th May, 1937, but before the institution of the suit in which this appeal arises. From after the date of that partition Joy Chand Serogi and Chatturbhuj Serogi became the owners of the said *sepatni*. They are plaintiffs Nos. 1 and 2 in the suit and Kishorimull Serogi is *pro forma* defendant No. 3.

The owners of the "four anna *patni*," Daiba Kumari and others, had given on the "four anna *darpatnidar*" the *barat* to pay the *patni* rent due for the same to the Nawab Bahadur of Murshidabad. The *darpatnidar* of the four anna *darpatni*, who was ostensibly Nirode Barani Dasi, did not however pay the *patni* rent on several

occasions. The *sepatnidar* Adhar Chandra Mondal deposited the same on two occasions to save the four anna *patni* from the summary sale under Regulation VIII of 1819—once in November, 1928, and the second time in November, 1929. His interest prompted him to do so, for if the said *patni* has been sold at those summary sales, the purchaser would have had the right to annul his *sepatni*. He brought two suits against Nirode Barani and her husband Dolegobinda Das for recovering the amounts deposited by him. In those two suits he made the *patnidar* of the "four anna *patni*" as also the other *sepatnidars*, Joy Chand Serogi and others holding under the "four anna *darpatni*" parties defendants. His suits were ultimately dismissed against Nirode Barani and Dole Gobinda. The judgment of this Court is reported in 40 C. W. N. 1037.

There was again default in the payment of rent due for the "four anna *patni*." This time a sale was held under Regulation VIII of 1819, at which *Joy Chand Serogi* purchased the said *patni*, but this sale was set aside at the suit of *Adhar Chandra Mondal*. If the sale had not been set aside Joy Chand would have been in a position to annul the three *sepatnis*, which were all profitable ones and would have certainly annulled those three *sepatnis*. As a sale of the "four anna *patni*" either in execution of 1819 would have imperilled the *sepatnis* including the *sepatni* of *Joy Chand* and his co-sharer Joy Chand purchased by private treaty the *patni* which was not profitable (for the *darpatni* rent was equal to the *patni* rent) in the name of his wife *Sardi Bai*, by paying Rs. 100 as its price. He thus acquires control of the field to a certain extent.

After *Sardi Bai* had become the ostensible owner of the "four anna *patni*", the *patni* rent due in respect thereof for the last six-months—Augrayan to Chaitra of 1340 B. S. (=October 1933 to April 1934) was not paid to the Nawab Bahadur of Murshidabad with the result that the latter applied for sale of the said *patni* under Regulation VIII of 1819. That sale was avoided by Kishorimull Serogi and Chatturbhuj Serogi depositing with the Collector the arrears due to the Nawab Bahadur in their character as some of the *sepatnidars* under that *patni*. They again saved the said *patni* from a summary sale under that Regulation for the arrears of rent for the first six months Bysack to Kartic of the year 1341 B. S. (April, 1934 to October, 1934). For recovering the amounts so deposited they instituted two suits, No. 581 of 1934 and No. 957 of 1935, in the first Court of the Munsiff at Berhampore against

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Nirode Barani and Dole Gobinda Das. In those suits they alleged that Dole Gobinda Das was the beneficial owner of the "four anna *darpatni*," Nirode Barani being his *benamdar*. They contended that as the *darpatnidar* had covenanted with the *patnidar* to pay the *patni* rent due to the zamindar, the *darpatnidar* who according to them was Dole Gobinda, was liable to pay them what they had deposited in payment of the *patni* rent. The learned Munsiff found that Dole Gobinda was the beneficial owner of the *darpatni*. He granted decrees against *Dole Gobinda* only. His decrees were affirmed on appeal by the learned Subordinate Judge on the 8th June, 1936. On second appeals to this Court, the suits were dismissed against Dole Gobinda but decreed against Nerode Barani. The judgment of this Court was delivered on the 7th March, 1939. It is Exhibit D(4).

In 1933, Sardi Bai as *patnidar* of the "four anna *patni*" had instituted a rent suit (Rent Suit No. 8 of 1933) in the Court of the Subordinate Judge at Berhampur (subsequently numbered 1 of 1934 on transfer to the Additional Court of the Subordinate Judge of the same place) for the rent due for the year 1337 B. S. on account of the "four anna *darpatni*." This suit was brought against both *Nirode Barani* and *Dole Gobinda*. In that suit she prayed for a decree against *Dole Gobinda* on the allegation that he was the beneficial owner of the *darpatni*, *Nirode Barani* being his *benamidar*. On the 24th April, 1934, the Subordinate Judge granted a decree against both on the finding that Dole Gobinda was the beneficial owner of the *darpatni* and *Nerode Barani* was his *benamidar* (Ex. 6). The appeal filed by Dole Gobinda was allowed by the learned District Judge on the 8th May, 1935 [Exhibit D(1)], he holding that Nirode Barani was the beneficial owner and not the *benamidar* for her husband. The judgment of the learned District Judge was upheld in second appeal by this Court which delivered its judgment on the 16th July, 1937, [Exhibit D (2)]. The finding of the Subordinate Judge that Dole Gobinda had no interest in that *darpatni* thus remained. It is after this judgment that the second appeals preferred against the decrees passed in the other two suits instituted by Kishorimull and Chatturbhuj Serogi for re-imbursement of the moneys they had deposited to prevent the sale of the "four anna *patni*" (Suits No. 581 of 1934 and No. 957 of 1935) were disposed of by this Court.

In 1935, *Sardi Bibi* filed another suit (Rent Suit No. 3 of 1935) in the Court of the Subordinate Judge Berhampore against Dole Gobinda and Nirode Barani for arrears of rent due for the years

1338 to 1341, B. S. in respect of the "four anna *darpatni*" on the same allegation as in Rent Suit No. 8 of 1933 / 1 of 1934. That suit was decreed against Nirode alone Dolegobinda being absolved on the finding that Nirode Barani was not his *benamdar*.

Sardi Bai, the decree-holder in those two suits, put her decrees into execution against Nirode Barani. She applied for sale of the defaulting tenure "the four anna *darpatni*"—under the procedure laid down in Chapter XIV of the Bengal Tenancy Act. The defaulting tenure was attached and advertised for sale. Chatturbhuj Serogi (plaintiff No. 2) and Kishorimull Serogi (pro-forma defendant No. 3) deposited the amounts for which the executions had been taken out and so averted the sale of the tenure, Rs. 4,358 odd was deposited by them on the 18th February, 1937 (which satisfied the dues of the decree-holder under the decree passed in Rent Suit No. 1 of 1934 and Rs. 10,883 odd was deposited by them on the 15th May, 1937 which satisfied the dues of the decree-holder under the decree passed in Rent Suit No. 3 of 1935. The rights of pro-forma defendant No. 3, Kishorimull Serogi, have passed to plaintiff No. 1 Joy Chand Serogi, by the terms of the partition deed executed by him and his brother Kishorimull. The suit in which this appeal arises is for the recovery of the said moneys from Dole Gobinda and Nirode Barani. As *sepatni* rent was due by the plaintiffs, they have deducted the same from the amount deposited by them and have prayed for a decree for the balance. The learned Subordinate Judge has found that Dole Gobinda has acquired "the four anna *darpatni*" in the *benami* of his wife, Nirode Barani. He has however, dismissed the suit against both Dole Gobinda and Nirode Barani. Even if his conclusions on the points of law be correct, it is difficult to realise why the suit has been dismissed against Nirode Barani. Important questions of law have been raised and discussed before us in an elaborate way by both the learned Advocates. They would arise, if it be held that Nirode Barani was the *benamdar* for her husband, Dole Gobinda, in respect of the "four anna *darpatni*." We will therefore consider that question first.

As the conveyance stands in the name of Nirode Barani the apparent state of things must be presumed to be the real, and he who alleges *benami* must in the first instance adduce such evidence as would rebut that presumption. Having regard to the fact of

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relationship between the parties, the fact of possession of the property and of the title deeds would afford no certain criterion on the question of *benami*. The fact that rent receipts were issued in the name of Nirode Barani or that she figured as plaintiff in rent suits against the *sepatnidars* or that the record-of-rights showed her name as the owner would not also be of much importance, for those circumstances would be in accordance with *benami* usage. The apparent state of thing would ordinarily be kept up The material points for consideration would be as to who paid the price, and the conduct of the parties. The fact that it is a common practice in Bengal for husbands to acquire properties in the *benami* of their wives and that Dole Gobinda had in the past employed his wife as *benamidar* (see some of the items of property mentioned in the partition deed Exhibit J) would be matters for consideration, but by themselves they would not establish that the "four anna *darpatni*" had been acquired by Dole Gobinda in the *benami* of his wife.

The "four anna *darpatni*" and "the twelve anna *patni*" had been purchased for a price of Rs. 8,000 from the heir of Tarini Prosad Dhur by the same conveyance. It is admitted that a substantial part of the price, more than half was raised by a loan from one Pankaj Kumar Das, to whom the heirs of Tarini Prosad Dhur were heavily indebted. The account books of Pankaj Kumar Das (Exhibit 1) show that he advanced a loan of Rs. 5,975 to Dole Gobinda Das and not to Nirode Barani on the 10th Falgun, 1330 B. S., the date on which Tarini Prosad Dhur's heirs executed the said conveyance. For the said loan Dole Gobinda gave security by executing a mortgage for Rs. 6,000 in favour of Pankaj Kumar Dass on the same date by which he hypothecated his personal properties. In the absence of explation from Dole Gobinda these facts would conclusively prove that the price was paid by Dole Gobinda. To counteract the effect of the said fact Dole Gobinda has, however, attempted an explanation. He says that he and his brother, Basanta, owed a sum of Rs. 7,000 to Nirode Barani. Nirode Barani had lent them Rs. 4,000 on a promissory note and had advanced them in driblets the sum of Rs. 3,000 for the purpose of enabling them to conduct a criminal case against one Tarapada Roy. At the partition between him and his brother, Basanta, he took upon himself the entire responsibility of paying Nirode Barani and for that he got in his allotment more properties. Before the partition his brother, Basanta, gave information to Nirode Barani that "the twelve anna *patni*" and "the four anna *darpatni*" were in the

market and she was desirous of purchasing them. He (Dole Gobinda) however, was not in favour of the purchase, but as Nirode Barani was insistent he had to fall in with her wishes and later on carried on negotiations for the purchase which had been started by his brother Basanta. As he had no sufficient funds at the time to repay the loan to Nirode Barani he borrowed Rs. 5,975 from Pankaj Dass; the said sum was taken by him in two instalments, about Rs. 1,500 was taken by him on the 10th Falgun, 1330, when he executed the mortgage in favour of Pankaj Dass and the balances of about Rs. 4,500 two or three days later when the price was paid to the vendors and the conveyance registered. He spent Rs. 1,500 for payment of his other debts and Rs. 4,500 was employed by him for satisfying in part the loan due to Nirode Barani from him, and Nirode Barani made up the price with that sum and a further sum of Rs. 3,500 which she advanced from her personal funds. If this story is believed it would afford a tolerable explanation. In corroboration of the last part of his evidence Nil Ratan Roy deposes to the fact that Nirode Barani gave him Rs. 3,500 which he carried for payment of the price, but we do not consider him to be a truthful witness. He had been a party to fictitious transfers of rent decrees which Nirode Barani had obtained against some of the *sepatnidar* and those transfers had been made with intent to defraud those *sepatnidars* who had deposited the *patni* and *darpatnis* rents.

The fact that Dole Gobinda and his brother were indebted to Nirode Barani for the sum of Rs. 7,000 is recited in the partition deed, Exhibit J, which was executed on the 15th February, 1923, a few days before the conveyance. In support of the loan of Rs. 4,000 the promissory note executed by Dole Gobinda and Basanta in favour of Nirode Barani has been produced. It is Exhibit K. A suggestion was made by the learned Advocate for the appellant that those moneys really belonged to Dole Gobinda and Nirode Barani was put forward by Dole Gobinda as the creditor to cheat his brother Basanta, but we do not find any tangible evidence in support of that suggestion. The partition deed proves that Nirode Barani had advanced Rs. 7,000 to Dole Gobinda and Basanta for meeting the expenses of their joint estate. So much of the story given by Dole Gobinda may be believed. It may also be taken as proved that Nirode Barani had personal funds which she had invested in moneylending business, which was at the relevant time worth Rs. 10,000 to Rs. 15000. But if that was the

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extent of her moneylending business it is unthinkable that she would have no account books.

In Rent Suit No $\frac{8 \text{ of } 1933}{1 \text{ of } 1934}$ where the question as to whether Nirode Barini was Dole Gobinda's *banamdar* for "the four anna *darpatni*" was the only important question, Dole Gobinda deposed that he had account books only up to the year 1329 B. S. and that he kept no account books from 1330 to 1336 B. S. [Ex. 6 and Ex. D (1)], a statement which drew from the court unfavourable comment. In this suit the plaintiffs called upon him to produce his account books from 1330 onwards, Dole Gobinda had filed his account books from 1330 to 1336 and 1338 to 1346. He attempted an explanation why the account book of 1337 could not be filed. That explanation does not convince us. He has made that gap intentionally. If he had filed the book of 1337 the account book filed by him for the year 1336 would not have squared up with the account book of 1338. The account books produced by him for the years 1330 to 1336 are even according to him incomplete books. He admits in his cross-examination that there is no entry of payment of Rs. 4,500 out of the amount advanced by Pankaj Kumar Dass towards the loan due to Nirode Barani, nor is there any entry to show how he spent the sum of Rs. 1,500 out of the money he took from Pankaj Kumar Dass. We have no doubt in our mind that the account books of 1330 to 1336 produced by him in this suit are not his genuine account books and that he has kept back his genuine account books. Pankaj Kumar Dass has given evidence for the plaintiffs. We find no ground for disbelieving him. He says that the price of Rs. 8000 was made up of Rs. 2,000 paid by Dole Gobinda in cash and Rs. 6,000 which Dole Gobinda had borrowed from him went towards the payment of the balance of the price by adjustment of his dues from the heirs of Tarini Prosad Dhur. His evidence gives a direct lie to the evidence of Dole Gobinda that Nirode Barani had paid Rs. 3,500 out of her money and that Rs. 4,500 only out of the loan advanced by Pankaj Kumar Dass was employed for payment of the balance of the price, he having spent the balance of Rs. 1,500 for meeting his other liabilities.

We have already found that Nirode Barani has suppressed her account books and what is more Dole Gobinda has not only suppressed his genuine account books from the year 1330 to 1336 but has produced faked ones. In these circumstances our infe-

rence is that if the genuine account books of that period had been produced they would have demolished Dole Gobinda's case that his wife was the beneficial owner. They would not have supported his case that with Pankaj Kumar Dass's money he had repaid in part the loan of his wife. They would have shown that he had credited to his account the loan taken from Pankaj Kumar Dass and that with the money and Rs. 2,000 advanced from his own funds he had made the purchase. Possibly they would have also shown that he had credited the income of the properties purchased by the said conveyance to his own account.

On the evidence as it stands we hold that Nirode Barani was the *benamdar* of Dole Gobinda in respect of the four annas *darpatni*. In arriving at the conclusion we have not taken into consideration Nirode Barani's evidence. The plaintiffs adopted a procedure which must be condemned. The learned Subordinate Judge also acted illegally in giving in advance to the commissioner the power to allow the plaintiffs to declare her hostile and to cross-examine her. Moreover her deposition is incomplete and for that reason alone her evidence has to be expunged from the record.

The findings in the judgment delivered in Rent Suits Nos. 1 of 1934 and 3 of 1935 on the question of *benami* are not *res judicata*, as plaintiff No. 2 and *pro forma* defendant No. 3 of the suit before us through whom plaintiff No. 1 claims were not parties to those rent suits. No doubt Joy Chand Serogi brought those rent suits in the name of this *benamdar Sardi Bai*, but he had brought those suits under a different title, namley as the *patnidar*.

On the finding that Nirode Barani is the *benamdar* of her husband Dole Gobinda the following points of law arise in this appeal:

I. Whether the plaintiffs can obtain from Dole Gobinda reimbursements of the amounts deposited by which the decrees passed in Rent Suits Nos. 8 of 1933 and 3 of 1935 were satisfied, seeing that these Rent Suits were dismissed against Dole Gobinda after contest. 1 of 1934

If the aforesaid question is answered against the plaintiffs no further question would arise. If however the said question is answered in their favour, three further questions would arise for consideration.

They are—

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II. Whether plaintiff No. 2 and *proforma* defendant No. 3 acted *bona fide* in satisfying the two rent decrees ;

III. Can the plaintiffs recover the amounts, seeing that at the time of those deposits they had not paid the *sepatni* rent due from them, and

IV. Is the plaintiff's claim barred by *res judicata* ?

The first question has to be considered from two aspects :

(a) Whether the fact that those rent suits were dismissed against Dole Gobinda would by itself defeat the plaintiffs' claim and (b) whether the fact that Dole Gobinda was not under a personal obligation to satisfy those decrees, as these decrees did not make him liable, would defeat the plaintiffs' claim.

We propose to consider the aforesaid questions in the order stated above:

I. (a) In cases of contribution between co-debtors the position is settled. The release of one of the debtors by the creditor does not prevent the other debtor who has satisfied the debt from claiming contribution from the released debtor: *Perumall Pillai* v. *Raman Chettiar*(1) and *Shah Ram Chand* v. *Pandit Parbhu Dayal* (2). It is also the law that the dismissal of the creditor's suit against one of the two co-debtors would not bar the debtor against whom the decree was passed from claiming contribution from his co-debtor against whom the suit had been dismissed, if he either satisfied the decree or the decree was satisfied by execution levied against his property. The right to contribute depends upon the fact that at the time the obligation was incurred it was a common liability of the two and on the further fact that it had been discharged either wholly by one of them or partly by him but in excess of his share. The common liability creates a collateral liability amongst the co-debtors depending upon the community of the burden and the benefit from the payment by one of them either wholly or in excess of his share : *Abraham Servai* v. *Rappial Muthirian* (3) and *Behari Lal Sen* v. *Indra Narayan Bandopadya* (4). If, therefore, Nirode Barani was the beneficial owner of a share only of the four anna *darpatni* and *benamdar* for Dole Gobinda for the remaining share, the dismissal of the Rent Suit No. $\frac{8 \text{ of } 1933}{1 \text{ of } 1934}$ and No. 3 of 1935 against Dole Gobinda would not have prevented her

(1) (1917) I. L. R. 40 Mad. 968 (975) (F. B.)
(2) (1942) I. L. R. All. 605 (620) ; (1942) 47 C. W. N. 1 (7) (P. C.)
(3) (1914) I. L. R. 39 Mad. 288.
(4) (1927) 45 C. L. J. 571 ; 31 C. W. N. 985.

from claiming contribution from Dole Gobinda after establishing that Dole Gobinda had a share in the said *darpatni*, if the decretal amounts had been realised from her property or if she had satisfied the decrees. She would only be debarred if in the suit for contribution she would only be debarred if in the suit for contribution she would be barred from provirg that Dole Gobinda was the beneficial owner of a share by reason of the finding that she was the sole beneficial owner and not *benamdar* of Dole Gobinda made in those rent suits operating as *res judicata*. These findings could not have been *res judicata*, for she and Dole Gobinda were co-defendants in those rent suits and no cross issue on the point of *benami* was raised by them in these suits. The requirements for *res judicata* as between co-defendants as laid down in the case of *Munni Bibi* v. *Trilokinath* (1) are not satisfied. The question then is whether the aforesaid principles are rendered inapplicable to a suit for re-imbursement.

We do not think that they are inapplicable. The only difference between contribution and re-imbursement is that in the former case one discharges his as well as another's liability and in the latter case he discharges the liability which is wholly the other's not voluntarily but under conditions which give him legal right to recoup himself. As the dismissal of the rent suits against Dole Gobinda would not have prevented Nirode Barani for getting re-imbursement from Dole Gobinda after satisfying those decrees, that fact cannot disentitle the plaintiffs from recovering the same from Dole Gobinda, if they are otherwise entitled to recover the same.

1(b). The Advocate for the plaintiffs has relied upon section 69 of the Indian Contract Act for supporting his clients' claim against Dole Gobinda. Plaintiff No. 2 and *pro forma* defendant No. 3 who deposited the two sums of money which satisfied the two rent decrees were persons who were undoubtedly interested in the payment of the decretal amounts, for if the decrees had not been satisfied, the purchaser at the sale in execution of those decrees would have been in a position to annul their *sepatni*. The whole question therefore is whether Dole Gobinda is a person "bound by law to pay" the amounts covered by those decrees. He was under no personal liability to pay the sums decreed as both the rent suits had been dismissed against him. But in execution of those decrees "the four anna *darpatni*" of which he is the beneficial owner could have been sold. The phrase "bound by law to pay" was first construed in

(1) (1931) L. R. 58 I. A. 158 ; 35 C. W. N. 66 ; 53 C. L. J. 552.

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Mothooranath Chuttopadhya v. *Kristo Kumar Ghose* (1). In that case Markby, J., held that that phrase did not contemplate personal liability only but all liabilities to payments for which owners are *indirectly* liable, that is, liabilities imposed upon the land itself of which they are the owners. This view has been followed in a series of decisions of this Court as well as of other High Courts: *Chandradaya Sen* v. *Bhagaban Chandra Sen* (2); *Registered Jessore Loan Co. Ltd.* v. *Gopal Hari Ghose Choudhury* (3); *Saraju Bala Roy Choudhury* v. *Kamini Kumar Choudhury* (4) and *Nandan Sahu* v. *Fateh Bahadur Singh* (5). On the view taken in those cases Dole Gobinda would be a person "bound by law to pay" the decretal amounts, for though he was not under a personal liability to pay the same, the liability was on the property, namely, "the four anna *darpatni*," of which he is the owner.

Mr. Mookerjee, who appears for Dole Gobinda, contends, firstly, that the abovementioned decisions have wrongly interpreted the phrase "bound by law to pay" occurring in section 69 of the Indian Contract Act, and secondly, that the view taken in these decisions is in conflict with other decisions of Division Benches of this Court. The cases on which he has placed reliance are *Boja Sellappa Reddy* v. *Vridhachala Reddy* (6); *Subramanya Chetty* v. *Mahalinga Sami Sivan* (7); *Puthempurayal Amman* v. *Mangalasseri* (8) and *Gangadas Bhattar* v. *Jogendra Nath Mitter* (9) and the judgment of S. K. Ghosh and Mukherjea, JJ., in *Dole Gobinda Das* v. *Chatturbhuj Serogi* (10) (Exhibit D/4).

In *Boja Sellappa's* case (6), it was held that an unregistered proprietor of a revenue-paying estate is a person whose interest is to pay the land revenue to save his property from revenue sale but he is not a person "bound by law to pay" the revenue, though revenue is a charge on the property; and so the registered proprietor, who had paid revenue at a time when a litigation about title was pending between him and the unregistered proprietor cannot recover the money paid by him from the latter under section 69 of the Indian Contract Act, and *Subramanya's* case (7) followed the interpretation given in *Boja Sellappa's* case (6) to the phrase "bound by law to pay." The decisions in those two cases are in conflict

(1) (1878) I. L. R. 4 Calc. 369.
(2) (1915) 23 C. L. J. 125; 32 I. C. 200.
(3) (1925) 30 C. W. N. 365.
(4) (1926) A. I. R. Calc. 765.
(5) (1940) I. L. R All. 71.
(6) (1907) I. L. R. 30 Mad. 35.
(7) (1909) I. L. R. 33 Mad. 41.
(8) (1912) 24 Mad. L. J. 548.
(9) (1907) 11 C. W. N. 403
(10) Unreported.

with the decisions in *Mothooranath's* case (1); *Chandradaya Sen's* case (2) and *Registered Jessore Loan Company's* case (3). Those Madras cases were cited in *Sarajubala Roy Choudhury's* case (4) but were not approved by a Division Bench of this Court. We cannot agree with those two decisions of the Madras High Court nor with the decision of the same Court in *Puthirpurayal* v. *Mangalasseri* (5). If the plaintiff in the last-mentioned case could not have recovered the revenue paid by him from the defendant on the view that section 69 of the Contract Act did not help him we fail to see how he could have a charge for his claim on the defendant's share in the property in respect of which the revenue was paid by him.

The two cases decided by Division Benches of this Court to which our attention has been drawn by Mr. Mookerjee will have to be examined carefully, for if they are in conflict with the other decisions of this Court, which we have noticed above the point of law will have to be referred to the Full Bench.

In *Gangadas Bhattar's* case (6) the first mortgagees had recovered a decree on his mortgage and in execution thereof had purchased the mortgage properties. In his suit he did not, however, implead the second mortgagee and some persons who had acquired a share in the equity of redemption.

The second mortgagee had sued on his mortgage without impleading the first mortgagee, obtained a decree and in execution thereof had purchased what had been mortgaged to him. His security included some of the properties included in the first mortgage. His purchase at the Court sale was prior to the purchase of the first mortgagee. The first mortgagee after his purchase brought a suit for possession, impleading the second mortgagee and two other persons who before his mortgage suit had acquired interest in the equity of redemption but had not been impleaded as defendants in the mortgage suit. It was held that the suit for possession by the first mortgagee was maintainable but the puisne mortgagees and those other persons who had acquired interest in the equity of redemption at the time when the first mortgagee instituted his suit to enforce his mortgage and who had been left out in that suit could exercise their right of redemption in that

(1) (1878) I. L. R. 4 Calc. 369
(2) (1915) 23 C. L. J. 125 ; 32 I. C. 200.
(3) (1925) 30 C. W. N. 366
(4) (1925) A. I. R. Calc. 765.
(5) (1912) 24 Mad L. J. 548.
(6) (1907) 11 C. W. N. 403.

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suit for possession. It is not necessary to express any view whether the view that that suit for possession was maintainable was correct in view of the decision of the Judicial Committee in *Bijai Saran* v. *Rudra Bageshwari* (1). We may only state that it has not been approved in subsequent decisions of this Court: *Jagat Chandra De* v. *Abdul Rashid* (2) and *Sailendra Nath* v. *Amarendra Nath* (3). There the question arose as to the terms of redemption. It was held that from the date of the mortgage decree obtained by the first mortgagee, interest was not to be calculated at the bond rate but at the rate mentioned in that decree. This part of the judgment also has not been approved in a later decision of this Court: *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra* (4). It was further held that in fixing the price for redemption the puisne mortgagee could not claim credit in the accounts for the sum of money, which he had deposited under section 171 of the Bengal Tenancy Act to satisfy a rent decree in respect of the mortgage property. Although no reference was made to section 69 of the Indian contract Act the language used in the judgment makes it quite clear that the learned Judge had in mind that section. They held that the plaintiff, who at the time of that deposit by the puisne mortgagee was only a mortgagee, was not a person bound in law to pay the rent decree. We cannot brush aside this part of the judgment simply because (it conflicts with?) other parts of this judgment of the Court. One fact however is significant, namely, that *Mothooranath's* case (5) was not noticed in the judgment which was delivered by one of the most erudite Judges of this Court. That omission in our opinion furnishes a clue to the interpretation of this part of the judgment on which Mr. Mookerjee has relied. If a person is personally liable he is "bound by law to pay". The first mortgagee, the plaintiff in that case, did not come within that category, for under the Indian law there is no privity between the mortgagee of a leasehold property and the landlord. In *Mothooranath's* case (5) it was laid down that the owner of a property was also "bound by law to pay" if that particular property of his for which another has paid, was liable to pay that sum, even if the owner was under no personal liability to pay it. The first mortgagee (plaintiff) did not also fall within

(1) (1929) 51 C. L. J. 70.
(2) (1934) 38 C. W. N. 1178.
(3) (1941) 73 C. L. J. 435; 45 C. W. N. 530.
(4) (1922) I. L. R. 49 Calc. 626. (5) (1878) I. L. R. 4 Calc. 369.

that class, as he was not at the time of the deposit by the puisne mortgagee the *owner* of the property. That in our judgment is the meaning and effect of that decision. It did not therefore lay down a proposition of law which was in direct conflict with the decision in *Mothooranath's* case (1).

The next decision to which our attention has been drawn by Mr. Mookerjee was the case of *Dole Gobinda Das* v. *Chatturbhuj Serogi* (2) (Exhibit D/4). In that case Chatturbhuj Serogi and Kishorimull Serogi, two of the *sepatnidars* of the same *sepatni* which we have in this case, deposited the *patni* rent due from Sardi Bai to the Nawab Bahadur of Murshidabad to save the *four anna patni* from a summary sale under Reg. VIII of 1819. They sued Nirode Barani and Dole Gobinda for the amount they had deposited. As in the present case they alleged that Dole Gobinda was the beneficial owner of the "four anna darpatni" and Nirod Barani was his *benamidar*. They obtained decrees against both in the lower Courts on the finding that Nirod Barani was Dole Gobinda's *benamidar*. Dole Gobinda preferred a second appeal to this Court. Before the second appeal was heard the *patnidari* (Sardi Bai) had sued Dole Gobinda and Nirode Barani for *darpatni* rent. In that rent suit (I of 1934) it was held that Dole Gobinda had no interest in the *darpatni* and on that finding the rent suit was dismissed against him. In the second appeal it was contended by *Dole Gobinda's* Advocate that the decision in the rent suit on the question of *benami* was *res judicata*. That contention was overruled. Then the learned Judge made the following observations on which Mr. Mookerjee places reliance :

"Though it (the decision in the rent suit) is not binding on the plaintiffs (Chatturbhuj and Keshrimull Serogi) it was binding on the parties to that suit and was between the *patnidar* on the one hand and Dole Gobinda on the other ; it must be taken that Dole Gobinda was not the *darpatnidar* and was not liable for the *patni* rent. That being so, the plaintiffs in our opinion cannot succeed in this suit for reimbursement which is instituted under section 69 of the Indian Contract Act unless he succeeds in showing that Dole Gobinda was bound to pay the *patni* rent."

In our judgment this passage cannot be construed as going against the view expressed in *Mothooranath's* case (3) unless some

(1) (1878) I. L. R. 4 Calc. 369
(2) Unreported.

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thing is imported into it which the learned Judges had not themselves said. In our judgment in construing the aforesaid passage the fact that the *darpatnidar* had a *barat* from the *patnidar* to pay the zemindar the *patni* rent must be kept in view. It is for that fact the learned Judges observed in the first sentence that Dole Gobinda was not liable to pay the *patni* rent (nor darpatni rent) for the reason that the *patnidar* could not enforce against him the barat arrangement it being found in a suit between the *patnidar* and Dole Gobinda that the latter was not the *darpatnidar*. The personal liability of Dole Gobinda *vis a vis* the *patnidar* to pay the *patni* rent was thus excluded. In that view the learned Judges held that no other consideration arose on the claim of the plaintiffs which was based on section 69 of the Indian Contract Act. In so holding the learned Judges were right, for there was no question of Dole Gobinda's property—the *darpatni*—being liable for the *patni* rent. The question that was considered by Markby, J. in *Mothooranath's* case (1) did not thus arise. There is therefore no conflict between the decision in *Mothooranath's* case (1) and the cases of this Court which have followed it and the decision either in *Gangadas Bahattar's* case (2) or the decision as embodied in *Dole Gobinda Das* v. *Chatturbhuj* (3) (Exhibit D/4). The question of referring the point to a Full Bench does not accordingly arise. Seeing that since 1878 up to the last case which was decided in this Court in 1926 the words "bound by law to pay" have been construed not only to include personal liability of the "other" but also liability on his property even when he was under no personal liability to pay, we are not inclined to differ from that view. We accordingly hold that the claim laid by the plaintiffs in the case before us comes within section 69 of the Indian Contract Act and unless otherwise barred they are entitled to recover the amount sued for from Dole Gobinda also.

II. It has been held in a series of cases that a person seeking to recover on the basis of section 40 of the Indian Contract Act must have acted *bona fide*. If he had made a payment of money which had benefited another, he cannot recover it from the latter, if he had made the payment *mala fide*—say with the object of creating evidence of title. Those decisions are expressly based upon the construction of the word "lawfully" used in that section. That word however does not occur in section 69. Some

(1) (1878) I. L. R. 4 Calc 369. (2) (1907) 11 C. W. N. 403.

(3) Unreported.

of the decisions of the Madras High Court which are reviewed in *Nanduri Saradamba* v. *Parakala Pattabhiramayya*(1) have held that *mala fides* on the part of the plaintiffs would disentitle him to relief even when his claim is based on section 69 of the Indian Contract Act. Some of these decisions of the Madras High Court may be explained, having regard to the facts of those cases, on the ground that the plaintiff was not interested in the payment of money as his title deed which gave the appearance of interestedness was fictitious. Be that as it may even if it be assumed that want of *bona fides* on the part of a plaintiff, who claims under section 69 and where case fulfils all the requirements of that section, would defeat his claim we do not find any materials on the record of this case which would sustain a finding that in satisfying the two rent decrees plaintiff No. 2 and *pro forma* defendant No. 3 had acted *mala fide*. They had a vital interest for their *sepatni* had been endangered by reason of those rent decrees. There is a presumption against misconduct and the principal defendants have not led any evidence which would rebut that presumption. We accordingly overrule this ground urged by the respondent's Advocate.

III. This ground has been urged by the respondent's Advocate from two aspects. He says in the first instance that Joy Chand was the *patnidar* as *Sardi Bai* has been found to be his *benamdar*. He further says that the rent decrees which Sardi Bai had obtained against Nirode Barani, the ostensible *darpatnidar*, were satisfied really by Joy Chand, he having used the names of *pro forma* defendant No. 3 and of plaintiff No. 2 in the applications for deposit of the decretal amount. On these two facts he urged that there was no payment because Joy Chand as *sepatnidar* purported to pay to himself as *patnidar*. The money did not thus change hands and so there was no payment. This argument proceeds upon the bare assumption, of which there is no evidence, that plaintiff No. 2 and *pro forma* defendant No. 3 did not themselves deposit there own money but Joy Chandra used them as pawns.

His second line of argument is that the *sepatnidars*, namley plaintiff No. 2 and *pro forma* defendant No. 3 being themselves in default in the payment of *sepatni* rent at the time of the deposit by them which satisfied the two rent decrees, cannot in law recover the amounts deposited from the *darpatnidar* under section 69 of the

(1) (1930) I. L. R. 53 Mad. 952.

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Indian Contract Act. The amount of the arrears of rent for these *sepatni* have been shewn in the plaint itself. It was Rs. 3,035-14-0 which falls far short of the amount decreed in Rent Suit No. 8 of 1933 and No. 1 of 1934 and No. 3 of 1935 and for which execution had been levied. For supporting his contention he relied upon the observation in *Adhar Chandra Mandal* v. *Dole Gobinda Das* (1). Those observations seem to us to be *obiter dicta*, as Dole Gobinda was absolved from liability to pay to Adhar Chandra Mandal on the principle laid down in *Tweddle* v. *Atkinson* (2). We are further of opinion that statutory provisions cannot be controlled by or whittled down by the general principles of equity, justice and good conscience. These principles can have application in India on the field outside statutory provisions. If there is a statutory provision on the subject the plaintiff would succeed or fail according as his case satisfy or fails to satisfy the statutory requirements. If his case comes within section 69 he is entitled to succeed and he cannot be denied relief by taking the aid of general maxims of equity. There is the further fact why we do not consider ourselves bound by any precedent on the point because it does not appear whether the arrears of *sepatni* rent due from Adhar Chandra Mandal to the *darpatnidar* were less than what he had paid on account of the *patni* rent in arrears which saved the *patni*. It may well be that his arrears had exceeded that amount. We have looked into the paper-book of that case but from it we could not ascertain what his arrears were at the time when he deposited the *patni* rent. We accordingly decide this point also against the respondent.

IV. The point of *res judicata* urged by the respondent has been based on two decisions of this court. The first is the decision in the suits which Adhar Chandra Mandal brought to recover from Dole Gobinda and Nirod Barani the patni rent that he had paid to save the "four anna *patni*." That decision is reported in *Adhar Chandra* v. *Dole Gobinda* (1). The second decision is the decision of this court as embodied in Ex. 1 (4). That was in the two suits which Chatturbhuj Serogi and Kisharmull Serogi had brought against Dole Gobinda and Nirod Barani to recover the *patni* rent which they had paid to save the "four anna patni" from

(1) (1936) 63 C. L. J. 287 ; I. L. R. 63 Calc. 1172 ; 41 C. W. N. 1037 (1050).
(2) (1861) 1 B & S 393.

sale. In both the suits the subject matter was the money paid towards *patni* rent. The suit before us concerns money paid to satisfy decrees for arrears of *darpatni* rent. All those suits were dismissed against Dole Gobinda. We do not consider that the decisions in those suits bar the plaintiffs from recovering a decree against Dole Gobinda on the ground of *res judicata*.

The learned Advocate for the respondents urges that even if those decisions are erroneous in point of law they operate as *res judicata*. In support of this contention he relies upon the Full Bench Decision in *Tarini Charan Bhattacharyya* v. *Kedar Nath Halder* (1). In that case however, Rankin C. J. made the position quite clear. He pointed out that a pure question of law, a point of law in an academic form, can never be in issue between litigants. The point in issue must necessarily relate to the rights of the parties to the suit, and the determination of those rights, may depend upon the determination of facts as well as on points of law. What the rule of *res judicata* bars is the reagitation between the self-same parties or their privies of the self-same issue which was directly and substantially in issue between them in the previous suit. The right asserted against Dole Gobinda in the earlier suits was the right to recover the *patni* rent deposited by the plaintiffs which saved the *patni* from sale. That is altogether a different right from the right asserted by the plaintiffs in the present suit, which is a right to recover the *darpatni* rent deposited by them which saved the *darpatni* from a rent sale.

In addition to the aforesaid reason, we do not consider these decisions to be *res judicata* in favour of Dole Gobinda.

In the suits instituted by Adhar Chandra Mandal, Dole Gobinda and the plaintiffs in the suit before us—the Serogis—were defendants. The Serogis were pro-forma defendants. No question of *res judicata* can, therefore, arise so far as they are concerned. *Broja Behari Mitter* v. *Kedar Nath Mozumdar* (2). Besides, Dole Gobinda and the Serogis were co-defendants and there was no cross-issue between them.

The suits by Chatturbhuj and Kishorimull Serogi (Nos. 581 of 1934 and 957 of 1935) against Dole Gobinda were instituted in the Court of the Munsif. As the Munsif would have had no jurisdiction to try the suit we have before us on account of his limited pecuniary jurisdiction, the final decision in those suits cannot operate as *res judicata*.

(1) (1928) I. L. R. 56 Calc. 723 ; 33 C. W. N. 126 (F. B) ; 48 C. L. J. 327.
(2) (1886) I. L. R. 12 Calc. 580 (F. B.)

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At the end of the argument, a point was raised that in any event as Joy Chand is the owner of the *patni*, the suit cannot be decreed in full, but the claim in the suit can succeed only to the extent of one third of the amount claimed inasmuch as Joy Chand who is also the patnidar claims to have twothirds share in the money in his right as the *sepatnidar*. We do not consider this point of any substance.

We accordingly overrule all the above points urged by the respondent.

We modify the decree passed by the learned Subordinate Judge.

The plaintiffs will have a decree against both Dole Gobinda and Nirod Barani for the amount deposited by them in the aforesaid two rent suits less the amount due by them on account of *sepatni* rent. This amount would carry interest at the rate of four per cent per annum (simple) from the date of deposits till recovery. The claim as made by the plaintiffs in their plaint is accordingly allowed in part. We allow proportionate costs of both Courts which would bear interest at four per cent. per annum (simple) from this date till recovery.

No order is necessary on the cross-objection as the subject matters of the cross-objection have been dealt with in the earlier parts of our judgment. We make no order as to costs in the cross-objection.

A. T. M. *Decree modified.*

(1) (1886) I. L. R. 12 Calc. 580 F. B.

FEDERAL COURT.

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November, 20.

PRESENT: *Sir Patrick Spens, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

A. W. MEADS.

v.

KING-EMPEROR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT LAHORE].

Court Martial Proceedings—Constitution Act, section 270 (1)—'Criminal'—Section, words of, plain—Result.

The Court Martial proceedings are not criminal proceedings within the meaning of section 270 (1) of the Constitution Act.

The words 'proceedings civil or criminal' in section 270 (1) of the Constitution Act have been used in their ordinary common meaning without any reference to the Army Act, the Military Code, military offences or proceedings by Courts Martial.

If words of a section are plain and can bear only one meaning in law, results are not a matter for the Federal Court and in some contexts the phrase criminal proceedings may include Court Martial proceedings.

Hence a Court Martial proceeding was legally and properly instituted against a Captain holding the temporary rank of Major in the Royal Engineers and attached to No. 1 Works Service (E & M) Group, I. E. for acts under section 17 of the Army Act alleged to be committed by him in the execution or purported execution of his duty as a servant of the Crown in India without the previous consent of the Governor General in his discretion.

The Federal Court did not accept as a help in construing section 270 of the Constitution Act logical considerations for treating all Court Martial proceedings under the Army Act as criminal proceedings.

The Federal Court cannot base its decision on construction solely on results.

Federal Court, Criminal Appeal No. VII of 1944.

The material facts appear from the judgment.

The Appellant in person.

Sir Brojendra Mitter, Advocate-General of India, (with him Mr. R. C. Soni, Advocate, Lahore High Court) instructed by Mr. K. Y. Bhandarkar, Agent for the Respondent.

The following judgment was delivered by

November, 20.

Spens, C. J.—The appellant in this case, A. W. Meads, was in April 1943 a Captain holding the temporary rank of Major in the Royal Engineers, and was attached to No. 1 Works Service (E. & M.) Group, I. E. In October 1943, he was charged with four offences under the Army Act. The charges, without the particulars which are not material to this judgment, were as follows:—

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1st Charge, A. A. Section 17.—When on active service, when concerned in the care of public property, fraudulently misapplying the same.

2nd Charge, A. A. Section 40 (alternative to 1st charge).—When on active service, neglect to the prejudice of good order and military discipline.

3rd Charge, A. A. Section 17.—When on active service, when concerned in the care of regimental property, fraudulently misapplying the same.

4th Charge, A. A. Section 40 (alternative to 3rd charge).—When on active service, neglect to the prejudice of good order and military discipline.

The appellant was ordered to be tried by a Field General Court Martial. He was in due course so tried and was convicted in respect of the two offences charged under section 17 of the Army Act, and was sentenced to two years' imprisonment and to be cashiered.

The appellant thereupon filed a petition in the High Court at Lahore under section 491 of the Criminal Procedure Code. The important point raised on the hearing of that petition before the High Court was that the act complained of was committed by the appellant in the execution or purported execution of his duty as a servant of the Crown in India and that, accordingly, under section 270 (1) of the Government of India Act, 1935, the Court Martial proceedings could not legally and properly be instituted against him without the previous consent of the Governor-General in his discretion.

Section 270 (1) runs as follows :—

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion."

The short but very important point so raised before the High Court at Lahore is whether the Court Martial proceedings in question were criminal proceedings within the meaning of section 270 (1).

The petition under section 491 of Criminal Procedure Code

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was referred to a Full Bench of the Lahore High Court consisting of Sir Trevor Harries, C. J., Abdur Rahman and Mehr Chand Mahajan, JJ. In a very full and careful judgment it was decided on the 12th April, 1944, that the Court Martial proceedings in question were not criminal proceedings within section 270 (1) and that there was no substance in this contention of the appellant. In his petition under section 491, the appellant also took other points as to the validity of the manner of constitution and proceedings of the Field General Court Martial. These too were all carefully considered by the Full Bench of the High Court who could find no legal substance in them. Accordingly on the 24th April, 1944, the petition of the appellant was dismissed, but a certificate under section 205 (1) of the Constitution Act was granted in respect of the question raised in regard to section 270 (1), and from that order the appellant has appealed to this Court.

The appellant appeared and argued his case in person before us. In the Court below it had been argued on behalf of the appellant that all Court Martial proceedings under the Army Act were criminal proceedings within the meaning of section 270 (1). But in view of the amazing consequences which, it was pointed out by the High Court, must result if this contention were right, the appellant before us limited his submissions and argued to the effect that (*a*) the acts on which the charges before the Court Martial were based were acts on which charges could have been framed under the ordinary criminal law of the land, (*b*) if the appellant had been charged under the ordinary criminal law of the land there was no doubt that the preceedings would have been criminal proceedings which could not have been instituted against the appellant without the previous consent of the Governor-General in his discretion, and (*c*) accordingly at least Court Martial proceedings in which a servant of the Crown in India was charged with offences in respect of acts which could equally be made the basis of a prosecution under the ordinary criminal law of the land, must be criminal proceedings for the purposes of section 270 (1). There could be, it was suggested, no reason why if a servant of the Crown was proceeded against under the ordinary criminal law in respect of such acts he should be entitled to the protection afforded by section 270 (1), whereas if he was proceeded against by Court Martial under military law he should not be entitled to such protection.

This Court has before now pointed out how difficult it is to make any logical grounds the basis of construing this section. It

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is a section which is capricious in its operation. For instance, had the appellant been employed in the affairs of a Province instead of having been employed in the affairs of the Government of India, there would have been no question now of section 270 (1) having any operation at all. It is only because no Federation has hitherto been established that the question of the protection afforded by section 270, sub-section (1), falls to be considered in respect of those still employed in connection with the affairs of the Government of India. We cannot therefore accept too readily as a help in construing this section logical considerations such as those stressed by the appellant.

Moreover whilst we agree that military officers are given by section 270 just the same protection in proceedings instituted under the ordinary civil and criminal law as is given to other servants of the Crown such as police and civil servants, there seems no logical reason to assume that a similar protection should extend to the institution of proceedings under the military code which is applicable to and peculiar to those classes of citizens subject to the provisions of the Army Act, and which necessarily imposes on those subject to its obligations and liabilities to which others are not subject.

Further in order to succeed in his submission the appellant must somehow extract from the phraseology of section 270 a difference in application or non-application according as Court Martial proceedings are in respect of acts on which charges under the ordinary criminal law could be based, or are in respect of acts on which no charge under the ordinary criminal law could be made.

In our view there is nothing to be found in the wording of the section to make a difference between Court Martial proceedings based on acts which constitute purely military offences under the Army Act and in respect of which no charge under the ordinary criminal law could be based, and Court Martial proceedings based on acts in respect of which either military offences under the Army Act could be charged or ordinary criminal proceedings could be taken. In our judgment there is no halfway house. Either all Court Martial proceedings under the Army Act are criminal proceedings within section 270 (1), or no Court Martial proceedings are. If all Court Martial proceedings under the Army Act are criminal proceedings, there is no way to escape from the fantastic results which would follow from such a decision, and which have been indicated at some length in the judgment of the Lahore High

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Court. On the other hand, this Court has no right to base its decision on construction solely on results. If words are plain and can bear only one meaning in law, results are not a matter for this Court, and there is no doubt that in some contexts the phrase criminal proceedings would be held to include Court Martial proceedings. See the speeches of their Lordships in the two cases, *In re Clifford and O'Sullivan* (1) and *Amand* v. *Home Secretary and others* (2).

The question for us is whether the phrase "No proceedings civil or criminal" in the context in which it is used in section 270 (1) of the Constitution Act should also be held to include Court Martial proceedings generally.

It was suggested on behalf of the Crown that if we were to hold that Court Martial proceedings were included in section 270 (1), the result would be that section 270 (1) would be an important modification or amendment of the Army Act, and the Advocate-General of India relied upon the terms of section 2 of the Army Act, *viz.*, "This Act shall continue in force only for such time and subject to such provisions as may be specified in an annual Act of Parliament bringing into force or continuing the same", as indicating an intention or policy of Parliament that the Army Act should not be modified or amended except by provisions specified in the annual Acts of Parliament extending the life of the Army Act. He accordingly submitted that Parliament could not have intended to make such an important modification or amendment in respect of procedure by Courts Martial by anything contained in the Government of India Act. Alternatively, if such modification or amendment had been made, he argued that a similar provision should have been inserted in the next Army annual Act following the coming into force of the Constitution Act, and that the absence of any such provision indicated that no amendment or modification had been made. Whilst we are not prepared to differ as regards the possible intention or policy of Parliament as to the recognised convenient method of confining amendments to the Army Act to the annual Acts extending the same, there is no doubt of the competency of Parliament to effect amendments of the Army Act by any other Act of Parliament. The argument only goes to the unlikelihood of an important amendment or modification of this nature having been made by the Government of India Act rather than by some provision in an annual Army Act,

(1) [1921] 2 A. C. 570.
(2) [1943] A. C. 147.

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The argument is not therefore conclusive and we are left to construe the material words as we find them in their context in the Government of India Act without any really decisive help or authority from outside.

Whilst as indicated above it may be proper in certain contexts to include Court Martial proceedings in the phrase criminal proceedings, in our opinion the ordinary person who uses the phrase "civil or criminal proceedings" usually intends only to indicate the ordinary civil and criminal proceedings which can be taken in accordance with the ordinary law of the land, and does not have in mind the special and peculiar code of Military Law applicable only to the limited classes subject to it and the military offences created by that code. In other words in our judgment the ordinary primary meaning of the phrase "civil or criminal proceedings" indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land, and should not be held to include proceedings under military law unless there be a context which so indicates. We can find no such context in section 270 or elsewhere in the Constitution Act. Indeed there are indications in the context against giving the phrase any meaning other than its ordinary primary meaning. Sub-section (2) with its references to "the court" and the recovery of costs and so forth is apposite enough to proceedings before the ordinary civil and criminal courts, but is hardly apposite to proceedings by Courts Martial. Further, in support of our view of the meaning which we think would ordinarily be given to the material words, it is noteworthy that although Section 270 (1) has been in operation since the 1st April, 1937, during which time many Courts Martial must have taken place in this country, no one has hitherto suggested that the phraseology as used in section 270 (1) includes proceedings under military law.

It may be true that the appellant might have been proceeded against in the regular courts on some charge under the ordinary criminal law based on the acts in respect of which he has been charged under military law, but he has at no time been proceeded against under the ordinary criminal law, and all the charges with which he was charged before the Court Martial were "military offences" under sections of the Army Act. The whole proceedings against him have therefore been entirely under the Army Act and not in any way under the ordinary criminal law. In our judgment unless we are compelled by some authority or by something in the context to hold that such proceedings under the Army

Act must be deemed to be included in the phraseology of section 270 (1), it would be unreasonable for us so to do. We think that the words "proceedings civil or criminal" have been used in their ordinary common meaning without any thought or reference to the Army Act, the Military Code, military offences or proceedings by Courts Martial, and we are satisfied that even though possibly such phraseology in other contexts may be held capable of including military offences under the Army Act or proceedings by Courts Martial, we are not bound to hold that they do so in the case of section 270 (1), and we are not prepared so to hold. Accordingly, in our judgment the submissions of the appellant have no force and so far as this point is concerned the appeal must be dismissed.

We gave an opportunity to the appellant to raise any other matter on account of which he considered that the proceedings against him were invalid or his conviction unjustified. He raised no new points. The points which he argued before us were all raised on his behalf in the High Court and were dealt with most fully in the judgment of the Full Bench. He was unable to indicate any respect in which the judgment of the Full Bench could be considered wrong. We agree with the judgment of the Full Bench on these other points raised by the appellant and we consider it unnecessary in the circumstances that we should deal with them further ourselves. This appeal must accordingly be dismissed.

A. T. M. *Appeal dismissed.*

PRESENT: *Sir Patrick Spens, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

MUKUNDA MURARI CHAKRAVARTI AND OTHERS

v.

PABITRAMOY GHOSH AND OTHERS.

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November, 13.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL AT CALCUTTA.]

Ultra Vires—*Non-Agricultural Tenancy (Temporary Provisions) Act (IX B. C. of 1940), section 3—Constitution Act, Schedule VII, Entry 4—Civil Procedure Code (Act V of 1908), section 4 (1)—'Tenant'.*

Order 21 rule 24 of the Code of Civil Procedure which directs that the Court should issue its process for the execution of the decree once the prescribed preliminary measures have been taken, is to be read subject to sec-

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tion 4 (1) and the operation of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, if falls under Entry 4 of List III of the Seventh Schedule to the Constitution Act, is saved by section 4 (1) of the Code of Civil Procedure. Hence no question of repugnancy between the Civil Procedure Code and the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act arises: *Megh Raj* v. *Allah Rakhia* (1).

A decree in ejectment against the respondents obtained on the 8th February, 1940, was confirmed on appeal on the 15th May, 1940. When the decree-holders applied for execution of this decree, on the 4th June, 1940, the judgment-debtors filed an application asking for stay of proceedings in terms of section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, which had come into force on the 30th May, 1940:

Held, that the proceeding in execution should be stayed under section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act.

The word 'tenant' in section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act is used in the popular sense, that is of a person who was a tenant before the decree in ejectment was sought or obtained against him. Hence the section is applicable to a person against whom a decree in ejectment had been passed.

Federal Court Case No. XXVI of 1943.

Sardar Raghbir Singh, Advocate, Federal Court, instructed by Mr. Ganpat Rai, Agent for the Appellants.

Mr. S. N. Mukherjee Advocate, Federal Court, instructed by Mr. P. K. Bose, Agent for the Respondents

Sir Brojendra Mitter, Senior Advocate, Federal Court (with him Mr. K. K. Raizada, Advocate, Federal Court), instructed by Mr. B. Banerji, Agent for the Advocate-General of Bengal.

The following judgment was delivered by

November, 13.

Spens, C. J.—Some of the appellants and the predecessors-in-title of the other appellants obtained a decree in ejectment against the respondents, on the 8th February 1940; and it was confirmed on appeal on the 15th May 1940. When the decree-holders applied for execution of this decree, on the 4th June, 1940, the defendants filed an application asking for stay of proceedings in terms of section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (Bengal Act IX of 1940) which had come into force on the 30th May, 1940. The decree-holders contended that this Act was *ultra vires* and inoperative; but this contention was overruled by the lower courts as well as by the High Court at Calcutta. Against this decision of the High Court this appeal has been preferred.

(1) [1942] F. C. R. 53 (58-59).

The reasons for the decision pronounced by the High Court in this case will be found in an earlier judgment of a Special Bench of that Court [*Shrimati Sukumari Debi* v. *Rajdhari Pandey* (1)] the operativeness of the Bengal Act which did not receive the consent of the Governor-General was impugned on the ground that some of its provisions (including section 3) were repugnant to the provisions of the Civil Procedure Code relating to execution of decrees and that to the extent of such repugnancy the Bengal Act was void under section 107 (1) of the Government of India Act. This contention was met by the High Court by two answers: (1) that the Bengal Act was covered by entries Nos. 2 and 21 of List II of the Seventh Schedule to the Constitution Act and that therefore section 107 had no application to the case; and (2) that even if, as contended, the Act should be held to fall under entry 4 of List III, its operation was saved by section 4 (1) of the Civil Procedure Code. Both these grounds have been challenged before us on behalf of the appellants. In the view we take on the second ground, it is unnecessary to express any opinion on the first.

Assuming that the impugned Act is legislation in respect of "civil procedure" (entry 4 in List III), section 107 (1) only enacts that the existing Indian law, *viz.*, the Civil Procedure Code shall prevail as against the provincial legislation and that the provincial law shall be void to the extent to which any of its provisions are repugnant to any provisions of the Civil Procedure Code. It is contended on behalf of the appellants that section 3 of the impugned Act, in so far as it directs that all proceedings for ejectment even in execution of decrees shall be stayed for a number of years, is repugnant to Order 21 rule 24 of the Civil Procedure Code which directs that the Court shall issue its process for the execution of the decree once the prescribed preliminary measures have been taken. But this rule of the Code must be read subject to section 4 (1) which saves any special power conferred by or under any other law for the time being in force. When it is so read, no question of repugnancy between the Civil Procedure Code and the impugned Act will arise—see *Megh Raj* v. *Allah Rakhia* (2).

It was faintly argued that even on the terms of section 3 of the Bengal Act, the order of the Courts below was not justified, as the section is limited to proceedings against a "tenant" and a person

(1) (1941) 74 C. L. J. 485.
(2) [1942] F. C. R. 53 (58-59).

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against whom a decree in ejectment had been passed could no longer be spoken of as a tenant. As pointed out by the High Court, it is clear from the tenor of the section that the word "tenant" is there used in the popular sense, that is of a person who was a tenant before the decree in ejectment was sought or obtained against him.

The appeal fails and is dismissed with costs.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT: *Lord Porter, Lord Goddard and Sir Madhavan Nair.*

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1944.

October, 17.

BISHUN SINGH *alias* BABU SINGH AND ANOTHER

v.

SRI THAKURJI MANGALA NAIN BHAGWAN

AND OTHER CONNECTED APPEALS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD].

Hindu Law—Bequest of absolute power of transfer without giving an absolute estate in the property to widow—Transfer by widow in exercise of such power, if binding on reversioners after her death.

A Hindu without giving an absolute estate in the property to his widow can confer on her an absolute power of transfer. This fuller power of transfer thus given to the widow who would otherwise have had only a limited power of transfer does not clash with any fundamental principle of Hindu Law.

When such powers have been transferred, the widow can make transfer at her will without any legal necessity and such transfer would be binding on the reversioner on the widow's death.

Under the Hindu law, a widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for *(a)* religious or charitable purposes or *(b)* other purposes amounting to legal necessity or *(c)* for the benefit of the estate.

If a Hindu owner confers an absolute power of transfer on his next heir the widow, who would otherwise have had only a limited power of transfer,

she acquires an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaing untransferred would devolve on the next heir of the husband, though where daughter or daughter's sons would be the next heirs they would be heirs of both.

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Bishun Singh v. Sri Thakurji Mangala Nain Bhagwan.

Sir Madhavan Nair.

Privy Council Appeal No. 39 of 1939 against the judgment and three decrees of High Court of Judicature at Allahabad dated the 30th October, 1935, setting aside a decree of the Subordinate Judge of Cawnpore dated the 2nd January, 1932 and dismissing the suit.

Appeal by the Plaintiffs.

Suit to set aside alienation by widow.

The material facts will appear from the judgment.

Their Lordships' judgment was delivered by

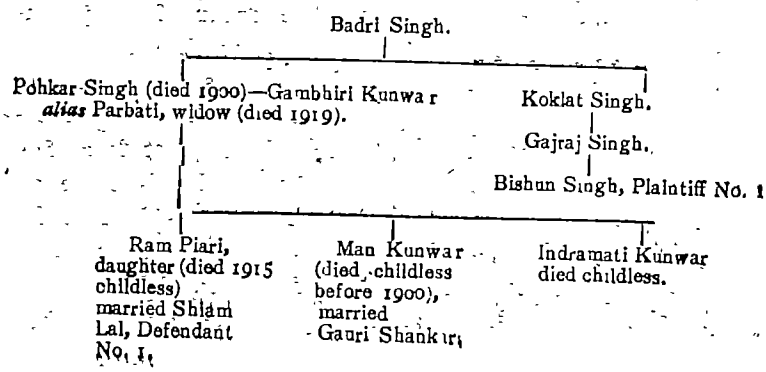
October, 17.

Sir Madhavan Nair:—These are consolidated appeals from a judgment and three decrees of the High Court of Judicature at Allahabad, dated 30th October, 1935, which set aside a decree of the Subordinate Judge of Cawnpore, dated 2nd January, 1932, and dismissed the plaintiffs' suit as against all the present respondents.

The appellants are the plaintiffs. The first appellant claimed the properties in suit as the nearest reversioner of one Pohkar Singh deceased; and the second appellant is a transferee of half of the properties from the first appellant.

Stated generally, the respondents all derived their title directly or indirectly from the transfers of the property made by Musammat Gambhiri, the wife of Pohkar Singh, who survived him and died in 1919.

The following pedigree set out in the plaint explains the relationship of the principal parties.


Badri Singh.
Pohkar Singh (died 1900)—Gambhiri Kunwar alias Parbati, widow (died 1919).
Koklat Singh.
Gajraj Singh.
Bishun Singh, Plaintiff No. 1
Ram Piari, daughter (died 1915 childless) married Shiam Lal, Defendant No. 1.
Man Kunwar (died childless before 1900), married Gauri Shankar.
Indramati Kunwar died childless.

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The last male holder of the properties in question was Pohkar Singh, who died in 1900. He was separate from his brother Koklat Singh. He had three daughters, one of whom, Man Kunwar, had died before 1st October, 1895, leaving a widower Gauri Shankar. Of the other daughters, Ram Piari, who died in 1915, was married to Shiam Lal (first defendant), and Indramati was a minor unmarried.

On 1st October, 1895, Pohkar Singh, executed a document purporting to be "a deed of gift" in favour of Gauri Shankar and others. The question for decision before the Board is, what rights were conferred by this document on his widow by Pohkar Singh.

After the death of her husband, Musammat Gambhiri executed the three following documents :—

1. On 22nd May, 1903, a deed of gift of certain properties in favour of her daughter Musammat Ram Piari. The latter died childless in 1915, and she made a deed of gift in favour of her husband Shiam Lal.

2. On 28th July, 1914, a sale deed of a village and a shop in favour of the father of defendant No. 2.

3. On 26th September, 1917, a deed of gift in favour of Shiam Lal. There have been subsequent transfers by the transferees from Musammat Gambhiri Kunwar.

The suit out of which this appeal arises was instituted by the appellants to set aside the alienations of the suit properties made by Musammat Gambhiri and her transferees, on the ground that Musammat Gambhiri had no power to make the said alienations as she took only the limited estate of a Hindu widow in the properties left by her husband, and that the alienations were not made for legal necessity.

The respondents pleaded that the deed of gift above referred to, amounted also to a "will" in favour of Musammat Gambhiri by virtue of which she became the absolute owner of the properties in question and she had therefore every right to alienate them, the appellants' contention on these points being that the "deed" does not amount to a "will" as there are no words of bequest in it and that it should be ignored altogether, as it confers on Musammat Gambhiri nothing more than a widow's estate on the properties which as the widow of Pohkar she would ordinarily have. The deed of gift, continuous in its narration of facts, consists in substance of two parts. By its first part, Pohkar Singh gifted a 16 annas share in Mauza Malkanpur and a 12 annas share

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in Mauza Deomai to Gauri Shankar, Ram Piari and Indramati in equal shares, reserving to himself the remaining 4 annas share in Mauza Deomai.

The relevant portions of the second part of the document run as follows :—

"The transferees, aforesaid, shall have, as proprietors, all powers, like myself to make all kinds of transfers and I have transferred the property, made gift of, with all sorts of interest relating thereto, just like myself, in favour of the transferees without the exception of anything and any interest and after the registration of this document I shall get the mutation of names effected, as required, in favour of the transferees" "as regards other property with 4 annas zemindari share in mauza Deomai, which is in my possession and which under this document has not been transferred, I shall have power of transfer and after my death my wife Musammat Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds" (or as Shiam Lal contends "shall have power of making every kind of transfer of the remaining property.")

"For the present I do not make any arrangement or transfer regarding that property. If I the executant or my wife die without making (any) arrangement or transfer, then my property shall according to *shastras* devolve on my daughters who are alive or on their descendants, entitled to it. Therefore I and my heirs and representatives shall have no objection to it, and if they do so, it shall not be heard, and will be null and void. Hence I have executed these few presents by way of a deed of gift so that it may remain as evidence and be of use when needed."

It may be mentioned in passing that the document is written in the vernacular language of the parties; and there was dispute with regard to the translation of that part of it corresponding in the original to what has been enclosed within brackets in paragraph 2 of the extract given above. The Board following the usual practice have adopted the translation accepted as correct by the High Court.

Nothing arises in this appeal regarding the construction or subject-matter of the first part of the document. It is admittedly, what it purports to be, *viz.*, a deed of gift. The dispute between the parties relates to the construction of its latter portion and the nature of this dispute has been already referred to. The contentions of the parties with respect to it were raised in the material portion of issue 2, and issue 3, which are as follows :—

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Issue 2, "Whether Pohkar Singh made any 'will' by means of the deed of gift of 1895.....or he died intestate?"

Issue 3, "Was Musammat Gambhiri the absolute owner of the properties by virtue of the 'will' of Pohkar Singh as alleged by the defendants?"

The Subordinate Judge held that the "deed" constituted also a "will" in favour of Musammat Gambhiri, but according to him, there was nothing in its provisions "to show that Pohkar Singh intended to confer an absolute estate, or anything more than a limited estate on his wife, or that he wanted to alter the course of inheritance in any way". He accordingly held that the alienations complained against were invalid as they were not supported by legal necessity. The appellants were therefore given a decree for possession of the properties with profits, except two items about which there is now no dispute.

On appeal, the learned Judges of the High Court held, agreeing with the Subordinate Judge, that no absolute estate was conferred on Musammat Gambhiri by her husband. They were also of opinion that the document was not intended by Pohkar Singh to effect any testamentary disposition of the property; but they held that even if Musammat Gambhiri took the property on the death of Pohkar Singh as a Hindu widow, still, the document conferred upon her as full a power of transfer over the properties as he himself had and the alienations in question which were made by her, acting on this power, were therefore valid. The appeals were therefore allowed and the plaintiffs' suit was dismissed.

In this appeal, the substantial question for decision is, what were the powers conferred on Musammat Gambhiri under the document? Did she get under it rights higher than those which a Hindu widow would ordinarily get over her husband's properties? The learned Counsel Sir Thomas Strangman, on behalf of the respondents, does not contend that the document bestows on her an absolute estate in her husband's properties, nor does he contend that it makes any testamentary disposition of the properties. So the question which their Lordships have to consider reduces itself to this, viz., Is the interpretation put upon it by the High Court correct, or should the correct interpretation be, as strenuously contended for by Mr. Khambatta for the appellants, that the document confers on Musammat Gambhiri nothing more than an ordinary Hindu widow's limited estate? If the High Court's interpretation is accepted as correct, then the further

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question—also considered by the High Court—arises, viz., Is the arrangement made by Pohkar Singh invalid under the principles of Hindu law?

It is clear to their Lordships that the "deed" does not confer on Musammat Gambhiri any absolute estate in her husband's properties. This is easily inferable from the contrast in the language used by Pohkar Singh in connection with the gift of the property which he has made by the first part of it in favour of Gauri Shankar and others and the language used in describing what has been bestowed on Musammat Gambhiri. It is enough to say that the word "*malik*" does not appear in the latter portion of the document. It is equally clear that Pohkar Singh has not gifted any property to his wife under the document; for he says, explicitly "For the present I do not make any arrangement or transfer regarding the property". The learned Judges have pointed out that the word in the vernacular translated in English as "arrangement" means a testamentary disposition of the property, and the word "transfer" would indicate transfer *inter vivos*, such as transfer by gift. Their Lordships apprehend that it is not the case of any party to the suit that any subsequent gift of the properties had been made by Pohkar Singh in favour of his wife. Paragraph 31 of the written statement of Shiam Lal, one of the respondents before the Board, makes this clear. It therefore follows—if there was nothing else in the document—that Musammat Gambhiri would take only the limited estate of a Hindu widow in the properties of her husband. This would apply to all the properties of Pohkar Singh as the words "the other remaining property together with 4 annas zemindari share" are certainly wide enough to include the rest of his entire estate, though only the properties gifted to his daughters were specified in the brown paper attached to the main sheet. In their Lordships' view, that part of the document may well be looked upon as a "will" as has been accepted by the Subordinate Judge and treated as such by the learned Judges of the High Court. The point is not of much importance in the case, but their Lordships are referring to it because it was argued in the Courts in India that there are no words of bequest in that portion of the document and the learned Counsel for the appellants made an allusion to it in opening the case, suggesting thereby that that part of the document may well be ignored altogether. Their Lordships think that the provisions in the document give a clear indication of the

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testamentary intentions of Pohkar Singh and that is all that at this stage need be said on the point.

So far, the construction of the document has not been difficult; but does it by any means follow from what has been said above, as has been emphasised by Mr. Khambatta, that Musammat Gambhiri gets under the document only a Hindu widow's limited estate and nothing more? Their Lordships think not, for to hold so would be to ignore a significant part of it to which their Lordships will now draw attention. With respect to the properties remaining after making the gift, Pohkar Singh says "As regards the other property with 4 annas zemindari share in Mauza Deomai which is in my possession and which under the document has not been transferred, I shall have power of transfer and after my death my wife Musammat Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds". It is clear to their Lordships that by this portion of the document Pohkar Singh was conferring a "power of transfer" in respect of his remaining estate on his widow. Note the words he uses: he says "I shall have power of transfer and after my death my wife Musammat Gambhiri shall have power of transfer". It is evident that by these words he refers to the free power of transfer which an owner has over his properties and he uses the same words in the same sense both with reference to himself and to his wife. In the earlier portion of the document referring to the gift, Pohkar Singh confers on the donees "all powers like myself to make all kinds of transfers." It is obvious that the word "transfer" must be understood as having been used in the same sense throughout the document, in other words it means that Pohkar Singh bestows on his wife as full a power of transfer as he, the owner himself, has over the properties. The contention that the power of transfer referred to, with respect to Gambhiri, is merely the power of transfer which a Hindu widow has over her deceased husband's properties in cases of legal necessity cannot be accepted, for if that were so, there was no need to confer specifically any such power at all; indeed, as his widow, Gambhiri would always get a Hindu widow's estate with power to transfer the properties for legal necessity. What appears to their Lordships to clinch the matter is the provision in the document "If I the executant or my wife die without making (any) arrangement or transfer then my property shall devolve according to *shastras* on my daughters who are alive....." In their Lordships' view this provision contemplates two things; (1)

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What it clearly says, viz., that the property should devolve according to *shastras* "if he or his wife died without making any arrangement or transfer" ; and (2) What it implies, viz., that the property would not devolve on daughters according to Hindu law if his widow had made any other arrangements during her lifetime. Arrangements with respect to the properties are here contemplated which certainly implies that Pohkar Singh had intended to confer powers on his wife to effect such arrangements. There is nothing in the document to show that the transfer herein contemplated is one for legal necessity only. As observed by the learned Judges of the High Court : "Had he intended that the property should devolve on the daughters in spite of any transfers having been made by the widow which are invalid under the Hindu law, he would not have prefixed the devolution 'according to *shastra*' by the condition of his wife dying without making any arrangement or transfer." It is true that their Lordships have said in *Mahomed Shumsool* v. *Shewukram* (1). "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu ..... knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate," but that statement is no authority for the proposition that if the terms of the will give the woman an absolute right of disposition, those terms should be ignored. In this connection their Lordships may well draw attention to the following observations made by Sir George Lowndes in delivering the judgment in *Jagmohan Singh* v. *Sri Nath* (2). "There is, their Lordships think, no magic in the use of any particular word or form of words ; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male." Construed in this light their Lordships have no doubt that by the terms of the deed in question Pohkar Singh has conferred on his widow full power to transfer over the properties which she has inherited from him as his widow.

Under the Hindu law, a widow or other limited heir has no

(1) (1874) L. R. 2 I. A. 7 (14-15); 14 B. L. R. 226 (231-232); 22 W. R. 409 (410).

(2) (1930) L. R. 57 I. A. 291 (294) ; 35 C. W. N. 45; 52 C. L. J. 462 (464).

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power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely :—(1) Religious or charitable purposes, (2) other purposes amounting to legal necessity and (3) for the benefit of the estate. The question now arises, whether if a Hindu owner confers an absolute power of transfer on his next heir, the widow, who would otherwise have had only a limited power of transfer, does she thereby get any higher rights ? It is not free from difficulty. On the one hand it may be said that when a testator dies without making any disposition of property, his widow would ordinarily get only such estate as the Hindu law allows her, and where there is no devise of any estate as here in favour of the widow, the conferment of an absolute power gives her no more rights than those possessed by a Hindu widow. On the other hand, if the husband could validly confer on her a full power of transferring the estate without limitation, then as stated by the High Court "she would acquire an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaining untransferred would devolve on the next heir of the husband, though where daughter or daughters' sons would be the next heirs they would be heirs of both." If the conferment of such power of transfer on a Hindu widow is not repugnant to any principles of Hindu law, then it appears to their Lordships that such conferment should be upheld as by so doing they would only be giving effect to the intentions of the testator, such intentions being not in conflict with the law.

It may be stated at once that no decision directly bearing on the point has been brought to their Lordships' notice ; those that are said to throw some light on it will be referred to presently. On principle, the difficulty presented by the case does not seem to be insurmountable. The objection strongly urged is against the conferment of power of transfer on Gambhiri without any bequest of property in her favour ; but the testator knows that she would inherit the estate in the ordinary course. What she will not so get ordinarily has now been bestowed on her by this "deed". The power of transfer has not been conferred on one, while the property devolves on another. Pohkar Singh was the absolute owner of the estate and had full power to dispose of it in any manner he liked. While he had full power to bestow an absolute estate on his widow, their Lordships cannot find any

valid objection to his being allowed to bestow a fuller power of transfer on her who would get the estate as his heir. This conclusion does not clash with any fundamental principle of the Hindu law.

In the course of the arguments, the learned Counsel drew their Lordships' attention to the decisions in *Bai Mativahoo* v. *Bai Mamoobai* (1) and *Narsingh Rao* v. *Mahalakshmi Bai* (2) and some other cases referred to in the High Court's judgment to show that conferment of power to adopt, of larger power to alienate, etc., on persons holding limited estate are not illegal, but as these cases are admittedly distinguishable on facts, their Lordships do not think it is necessary to discuss them. However, one decision may be referred to as of some interest having regard to its facts. In *Promode Bala Debi* v. *Krishna Sundari Debi* (3), a testator "by his will empowered his two wives to make a *patni* settlement of his immovable property" and wished that they would make the *patni* settlement with his brother. The two widows were given monthly allowances but no bequest of the estate was made in their favour. By one clause in the "will" full authority was given to three persons to do what they thought fit as regards the performance of the rites and the debts and the dues. It was held by the learned Judges of the High Court that the clauses of the "will" by which the executors were authorised to pay the expenses of the rites and ceremonies and the debts and the widows were empowered to make *patni* settlement of the immovable property were not inconsistent. The power of the widows to make *patni* settlement of the immovable property was recognised as it did not clash with the authority given to the executors. As pointed out by the learned Judges of the High Court in the present case, "This was a case where in reality there was no bequest of any estate to the wives at all and they were given some allowances and only a power to make a *patni* settlement with the testator's brother. The power to make such a transfer was assumed to be valid by the Bench and it was not considered that the conferment of such a power by a Hindu woman was in any way repugnant to the principles of the Hindu law." "This case is referred to as an instance to show that the idea of conferring enlarged powers of alienation on widows without making bequest of any estate is not alien to the minds of Hindu testators. However, their Lordships' decision in the present case must rest on the principles on which

(1) (1896) L. R. 24 I. A. 93; 1 C. W. N. 366; I. L. R. 21 Bom. 709.
(2) (1928) L. R. 55 I. A. 180; 32 C. W. N. 1005; I. L. R. 50 All. 475; 43 C. L. J. 106.
(3) (1905) 1 C. L. J. 301.

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they have based it and not on any express decision brought to their notice.

For the above reasons, their Lordships hold, agreeing with the High Court, that "although Musammat Gambhiri Kunwar did not acquire an absolute estate under the 'will' of her husband, she acquired thereunder a full power of transfer in excess of the ordinary powers of transfer for legal necessity possessed by her as a Hindu widow, and in the exercise of that full power she had authority to make an out and out gift to her daughters, which would remain binding on the reversioners even after her death." The alienations questioned in these appeals are all valid. In the result, these consolidated appeals should be dismissed with the costs of the respective respondents. Their Lordships will humbly advise His Majesty accordingly.

P. S. ; A. K. D. G. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice N. A. Khundkar and Mr. Justice C. C. Biswas.

Civil.
1945.
January, 11.

NARENDRA NATH ROY CHOUDHURY AND OTHERS.

v.

HERAMBA CHANDRA ROY CHOUDHURY AND OTHERS.*

Compromise for instalment payment in execution proceedings—No new decree substituted—Default in instalment—Limitation for fresh execution—Section 48, Subsection (1) clause (b), Civil Procedure Code (Act V of 1908).

In the proceedings for the execution of an *exparte* decree dated the 26th May, 1927, a compromise was entered into between the decree-holder and the judgment-debtor. By the compromise dated the 20th July, 1934, the decretal dues were adjusted at a particular sum which was to be paid in nine instalments, in default of any one of which the decree-holder would be

*Appeal from Appellate Order No. 294 of 1942, against the order of M. Halder, District Judge, Faridpur, reversing the order of A. Das, Esq., Subordinate Judge, Faridpur.

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entitled to recover the entire decretal amount, and certain properties of the judgment-debtor were made security for decretal amount. The compromise was recorded in the execution proceedings and the execution case was dismissed. The judgment-debtor having failed to pay the fifth instalment, an execution case was started on the 9th September, 1941, more than 12 years after the passing of the original decree. It was contended on behalf of the judgment-debtor that the execution case was time-barred as it was started more than 12 years after the date of the original decree. It was argued on behalf of the decree-holder that limitation would run from the date upon which the judgment-debtor defaulted in the payment of the fifth instalment and the execution being within 12 years from that date was within time, according to clause (b), sub-section (1), section 48 of the Code of Civil Procedure :

Held, (1) that the application for execution was not barred by limitation.

(2) that the intention of the parties was that the original decree was to be executed in the event of default of any instalment and the provision in the compromise petition creating a charge on certain properties made no difference in this respect.

(3) that the order of the executing court dispensing with the execution case on the basis of the compromise is a "subsequent order" within the meaning of clause (b), sub-section (1), section 48 of the Code of Civil Procedure and the limitation for fresh application for execution is to run from the date of default in the payment of any instalment.

Kartic Chandra Mukherjee v. *Batakrishna Roy* (1) and *Pratab Bahadur Sahi* v. *Ram Marwari* (2) referred to.

Appeal by the Judgment-debtors.

Application for execution by the Decree-holder.

The material facts will appear from the judgment.

Messrs. Anilendra Nath Roy Choudhuri, *Prasun Chandra Ghosh* and *Dhirendra Nath Sarkar*, for the Appellant.

Mr. Abinash Chandra Ghosh, for the Respondents.

The judgment of the Court was as follows :—

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One Ashutosh Roy Choudhury, the predecessor of the respondents in the present appeal, obtained an exparte money decree against the predecessor of the appellant in this appeal for a sum of Rs. 2,288 together with costs. The decree was pronounced on the 26th May, 1927, and it was signed on the 2nd June, 1927. Subsequently, the decree-holder applied for execution in two consecutive proceedings which were admittedly within time and which were, for some reason with which we are not concerned, dismissed. Eventully, in 1933, another execution case, No. 109 of 1933, was instituted by the decree-holder. In that case a compromise was entered into between the decree-holder and the

(1) (1937) 65 C. L. J. 403 ; 176 I. C. 212. (2) [1940] I. L. R. All. 536.

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judgment-debtor on the 20th July, 1934, by which the decretal dues were adjusted at a sum of Rs. 3,295-1-3 pies including interest and costs. The main terms of the compromise were that a sum of Rs. 1,500 was to be paid by the judgment debtor to the decree-holder in nine annual instalments, and it was stipulated that the decree would be regarded as fully satisfied if and when a sum of Rs. 1,500 only out of the figure of Rs. 3295-1-3 just mentioned had been paid in the manner stated. It was further agreed that if the judgment-debtor made default in the payment of any instalment, the decree-holder would be entitled to recover the entire decretal amount. Certain properties of the judgment-debtor were hypothecated by this compromise as security for the decretal amount in the event of any default taking place in the payment of instalments. This compromise was recorded in the execution proceedings and the execution case was dismissed. Thereafter four instalments were in fact paid, but there was a default in the payment of the fifth instalment.

On the 9th September, 1941, that is to say, more than 12 years after the passing of the decree, the execution case out of which this appeal arises was started. Upon an objection being taken by the judgment-debtor, the present appellant, it was held by the Court of first instance that the present execution proceeding was barred by limitation. This decision has, however, been reversed on appeal by the learned appellate court below, and the present appeal is directed against that decision.

On behalf of the appellant, it is conteneded that the execution is clearly time-barred because what the respondents were endeavouring to execute in the present case was the original decree of the 26th May, 1927. The learned Advocate who appears for the appellant has contended with great plausibility that this is not a case in which it can be said that a new decree was substituted in place of the original decree by the compromise which the parties arrived at on the 20th July, 1934. He has, in our judgment, rightly distinguished the case of *Hriday Mohan Sanyál* v. *Khagendranath Sanyal* (1) in which the execution with which the court was concerned was execution not of the original decree, but of a subsequent decree which had superseded the former by reason of a new arrangement entered into by the parties. In our judgment, this case has no application to the facts with which we are dealing, because the language of the compromise deed entered into by the parties to the present proceeding is inconsis-

(1) (1929) I. L. R. 57 Calc. 789.

tent with the view that they intended to replace the original decree of the 26th May, 1927, by any subsequent arrangement capable of execution as a decree. In paragraph 4 of the petition of compromise the following words occur :

"I the judgment-debtor remain bound to pay to you.....the entire amount due to you under this decree.....",

and in paragraph 5 the following words appear :

"You shall be entitled to realise the amount payable by me in execution of the decree.....".

The language of the compromise leaves no room for doubt that the intention of the parties was that in the event of default in the payment of any one instalment, what would be enforcible through the process of the court was the original decree. That fact that certain specific properties of the judgment-debtor were being hypothecated so as to make them answerable for the decretal amount makes no difference to the intention of the parties that it was the original decree which was to be executed in the event of default in the payment of an intalment.

On behalf of the decree holder respondents, it has been contended on the other hand by Mr. Ghose that limitation would run from the date upon which the judgment-debtor defaulted in the payment of the 5th instalment and he bases his contention on the language of clause (b) of sub-section (1) of section 48 of the Code of Civil Procedure. His contention is that this execution case was within time because it was within 12 years of the date of default contemplated by that clause. The material words of that clause are "Where the decree or any subsequent order directs any payment of money.....at recurring periods, the date of the default in making the payment.. .....in respect of which the applicant seeks to execute the decree." Now the applicant in the present case is seeking to execute the decree in respect of the entire decretal amount. By reason of the compromise it can be said that there has been a default in making payment of the entire decretal amount insamuch as such payment became due directly the judgment-debtor made default in payment of the 5th instalment. It follows, therefore, that this clause would apply, provided there was any "subsequent order" directing the payment of the amount in question. Now it is not disputed that the compromise arrived at between the parties was recorded in the execution case, and that the execution case was disposed of on the basis of that compromise. In so far as the compromise contained any operative words, those words become an order of the execu-

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ting court, and that being so, they would come within the intention of the word "any subsequent order" contained in section 48 sub-section (1) clause (b) of the Code of Civil Procedure. It was contended in answer to this that "subsequent order" in this provision cannot mean the order of the executing court, but must apply to orders passed by that court alone which pronounced the decree. This point is clearly concluded by authority. In the case of *Kartic Chandra Mukherjee* v. *Batakrishna Roy* reported in (1), it was held that an order of the High Court made after an appeal in an execution case had been dismissed, but during the pendency of an application for leave to appeal to the Privy Council, was an order within the meaning of the words in clause (b) of sub-section (1) of section 48 of the Code of Civil Procedure. In that case the order of the court was one which had been passed in terms of a compromise arrived at between the judgment-debtor and the decree-holder by which it was stipulated that the decretal amount would be paid by instalments and that the limitation contained in section 48 of the Code of Civil Procedure would run from the date of the default of the judgment-debtor to pay any one of the instalments stipulated.

A different view once found favour with the Allahabad High Court but the view now taken by that Court seems to be in accordance with the decision just referred to. In the case of *Pratab Bahadur Sahi* v. *Ram Marwari* (2), a compromise had been entered into between a decree-holder and a judgment-debtor in execution proceedings, and it had been stipulated that the decretal amount was to be paid in 8 annual instalments. A default was made in payment of the 5th instalment and the decree-holder made an application for execution, but this application was found to be more than 12 years after the date of the decree. The court held that the case fell under clause (b) of section 48 sub-section (1) of the Code of Civil Procedure, and the application for execution was not barred by limitation under that section.

The appeal accordingly fails and is dismissed with costs. We assess the hearing fee at two gold-mohurs.

P. S.; A. K. D. G. *Appeal dismissed.*

(1) (1937) 65 C. L. J. 403; 176 I. C. 212.

(2) [1940] I. L. R. All. 536.

Before Mr. Justice R. C. Mitter and Mr. Justice N. A. Khundkar.

BISHUN PRASAD CHUNDER

v.

BINOY KRISHNA RAHATGI AND ANOTHER.*

CIVIL.

1944.

December, 12, 13 22.

Land Acquisition Act (I of 1894), section 18, reference under, on application of owner of dominant tenement, heard by the President of the Improvement Tribunal without assessors—Such proceeding, if defective—Section 3 Land Acquisition Act—Easement, if comes within definition of "land"—Section 16—"Incumbrance," if includes easement—Right of dominant tenement, if to be valued independently—"Full market value" of servient tenement, how to be paid—Deduction from "full market value" of the servient tenement, if represents the value of the easement of the dominant tenement—Mode of disbursement of compensation to the dominant tenement.

Without notice to the Collector and without the help of the Assessors, the President of the Improvement Tribunal heard the reference made under section 18 of the Land Acquisition Act on the application of the owner of the dominant tenement against the Collector's award of compensation to him, holding it to be one for apportionment only and not for valuation and increased the amount. On appeal:

Held that the procedure followed was misconceived and defective. The Collector ought to have been given notice under section 20 of the Act and the case should have been tried as a valuation case, which under the provisions of the Calcutta Improvement Act, could be tried only by the Tribunal composed of the President and the two Assessors.

An easement comes within the definition of land as given in section 3 of the Land Acquisition Act, because it is benefit arising out of land.

On acquisition it would vest in the Government free from the easement of the owner of the dominant tenement (section 16). The owner of the dominant tenement would accordingly be entitled to compensation for the loss of his right. His right must be valued and he must be compensated by the sum of money which represents the value of the right.

On the compulsory acquisition of the servient tenement a sum of money should be deducted from its "full market value" and the balance only should be awarded to its owner.

The fallacy lies in the assumption that the value of an easement or restrictive covenant to the persons entitled thereto is the same as the amount by which the existence of that easement or covenant depreciates the value of the land subject thereto.

*Appeal from Original Decree No 109 of 1943, against the decree of N. R. Das Gupta Esq., President, Calcutta Improvement Tribunal, dated 30th July, 1942, in L. A. Case No 18 of 1942, (Apportionment).

Civil.

1944.

Bishun Prasad Chunder v. Binoy Krishna Rahatgir.

The Government of Bombay v *The Century Spinning and Manufacturing Company Ltd*, (1) approved.

Where the value of the easement is more than the sum deducted from the "full market value" of the servient tenement, which is acquired in making payment to the owner thereof, the excess must be paid by the Government to the owner of the dominant tenement.

Appeal by Claimant No. 1 (a).

Proceedings under Land Acquisition Act for compensation to owner of dominant tenement.

The material facts will appear from the judgment.

Dr. Radhabinod Pal and *Mr. Amiya Kumar Mukherjee* for the Appellant.

Messrs. Gopendra Nath Das and *Madan Chandra Ghose* for the Respondent.

C. A. V.

December, 22.

The judgment of the Court was as follows :—

Premises No. 12 Khangrapatti Street (hereafter called the acquired premises) was acquired under the Land Acquisition Act for the improvment of Calcutta. It was a narrow piece of land, 29 feet 3 inches long from east to west and 5 feet 4 inches broad from north to south. Its area was 3 Chattaks and 21 square feet. At the time of the acquisition there was an one-storied building upon it, about ten feet high from the ground level.

Premises No. 5 Armenian Street (hereafter called the dominant tenement) on which there is a four-storied building was to the immediate east of the acquired premises and of the adjoining premises No. 11 Khangrapati Street. In its western wall it has a vent hole in the ground floor and a window on the fourth story, which overlooks the acquired premises. There are three other windows on the first, second and third floors, on that wall which overlooks premises No. 11 Khangrapatti Street. The owners of premises No. 5 Armenian Street, who are the respondents in this appeal, claim that at the time of the compulsory acquisition they had easement to receive light and air through that vent-hole and all those windows over the acquired premises. Whether they had the right to have that passage of light and air over the acquired premises through all the apertures is a question between the parties to this appeal, but in the view we are taking on the question of law, which we will hereafter discuss, it is not necessary for us to express any opinion on that point.

The Collector was of opinion that Rs. 9000 was the "full

(1) (1941) I. L. R 1942 Bom 403 (424, 425).

market value" of the land and structures of the acquired premises. By "full market value" we mean the market value of the acquired premises as if there was no easement or other incumbrance affecting it. As in his opinion that premises was under the burden of easements of light and air of the dominant tenement, premises No. 5 Armenian Street and of other dominant tenements he awarded the sum of Rs. 1100 odd to the owners of the dominant tenements and gave the balance Rs. 7000 odd to the owners of the acquired premises. Out of the sum awarded as compensation to the owners of the dominant tenement the respondents were given Rs. 165 as owners of the dominant tenement No. 5 Armenian Street. Against the said award of the Collector the owners of the acquired premises did not make a reference to court under section 18 of the Land Acquisition Act, but the respondents did. In their application for reference they did not name any person or persons as opposite parties. They only stated that they had easement of light and air over the acquired premises in respect of the several windows and openings and that the award made in their favour by the Collector was too low and should have been for Rs. 5000. On receipt of the reference the President of the Calcutta Improvement Tribunal gave notice of that application to the owners of the acquired premises but did not give notice to the Collector under section 20 of the Land Acquisition Act. Accordingly the owners of the acquired premises only appeared and contested the reference. The reference was heard by the President of the Calcutta Improvement Tribunal without the assessors on the footing that it was a reference for apportionment only and was not a reference relating to valuation. The learned President pronounced his judgment on the 30th July 1942. He held that the owners of the dominant tenement had the right to receive light over the acquired premises not only through the vent hole and the window that overlooked the same but also through the three other windows that overlooked premise No. 11 Khangrapatti Street, as those windows had been receiving rays of light over the roof of the low building on the acquired land in an oblique manner. He assessed the value of the easement right on certain calculations at the sum of Rs. 900 and directed that sum to be paid wholly out of the sum of Rs. 9000 which the Collector had assessed as the "full market value" of the acquired premises. In our judgment the learned President has committed an error. The proceeding in Court below was misconceived and defective [illegible] the beginning. The Collector

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ought to have been given notice under section 10 of the Act and the case should have been tried as a valuation case, which under the provisions of the Calcutta Improvement Act, could be tried only by the Tribunal composed of the President and the two assessors.

An easement comes within the definition of land as given in section 3 of the Land Acqusition Act, because it is benefit arising out of land. If the servient tenement is acquired under that Act, on acquisition it would vest in the Government freed from the easement of the owner of the dominant tenement (section 16). The owner of the dominant tenement would accordingly be entitled to compensation for the loss of his right. His *right* must be valued and he must be compensated by the sum of money which represents the value of his right. This is one fundamental proposition and it should not be lost sight of. The second fundamental proposition which must also be not overlooked where the premises acquired is a servient tenement, is that the owner thereof would not be entitled to the "full market value" of his property. The easement depreciates its value to him. He can only have the value of beneficial enjoyment thus restricted by the easement affecting it. This accords with the principle that if there is a right of way over his land he would be obliged to keep the space over which the pathway runs unbuilt, open and unobstructed. If an easement of light and air affects his property he is obliged to keep a sufficient portion of his land open. He cannot even build a high boundary wall or put up a high hoarding to protect his privacy. For those restrictive user a willing buyer would not give him the same price which he would have given, if the premises had not been burdened by the easement. It would follow from this second proposition that on the compulsory acquisition of the servient tenement a sum of money should be deducted from its "full market value" and the balance only should be awarded to its owner. But the sum so deducted would not necessarily be the value of the easement the *right* of the owner of the dominant tenement, which had not been acquired, but which easement would be destroyed on the acquisition of the servient tenement. The amount representing the value of that *right* may be more, or may be less, than the sum that is to be deducted from the "full market value" of the acquired premises in making payment to owner thereof The cases mentioned by Beaumont C. J. by way of illustration at page 426 of the judgment that he delivered in the case of *Government of Bombay* v.

The Century Spinning and Manufacturing Company Ltd. (1) bring out the point. We entirely agree with the learned Chief Justice of the Bombay High Court, where referring to the argument of Sir Jamshedji Kanga noted at page 424 of the report, he said that "the fallacy in the argument lies in the assumption that" the value of an easement or restrictive covenant to the persons entitled thereto is the same as the amount by which the existence of that easement or covenant depreciates the value of the land subject thereto. From what we have said the third proposition follows. It is that where the value of the easement is more than the sum deducted from the "full market value" of the servient tenement, which is acquired, in making payment to the owner thereof, the excess must be paid by the Government to the owner of the dominant tenement. The view expressed by the Calcutta Improvement Tribunal in the case noted at page 234 of the commentary on the Land Acquisition Act by Rai Bahadur M. N. Gupta has our approval as it accords with sound principles. Whether in the circumstances of the case before us the respondents would be entitled to take out of the sum awarded by the Collector to the owners of the acquired premises any portion of the amount at which their easement is valued by the Court, if that value exceeds Rs. 165 is, however, a different question. The case therefore has to go back. The Court below will issue notice upon the Collector under section 2c and then the Tribunal, that is the President and the Assessors, will determine the question involved in the case, namely,

(i) whether the respondents had easement to light and air in respect of the all or some of the windows and apertures over premises No. 12 Khangrapati Street,

(ii) if so, what compensation ought to be paid to them in respect of their *right*,

(iii) what ought to be the depreciation of the "full market value" (Rs. 9000) of premises No. 12 Khangrapati Street on account of the burden of the easement of the respondents.

If the Tribunal comes to the conclusion that the value of the easement to the respondents is more than Rs. 165, and if the depreciation by reason of the burden of that easement on the property acquired be assessed at more than that sum a further question would arise, in view of the provisions of section 25 of the Land Acquisition Act or apart from it, namely whether the

(1) (1941) I. L. R. 1942 Bom. 403 424, 425.)

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whole of the amount in excess of Rs. 165 that will have to be awarded to the respondents for the value of their easement is to be borne by the Province of Bengal or part thereof is to be deducted from the amount which the Collector had awarded to the owners of the acquired premises and paid to the respondents, and the balance by the Province of Bengal. The question also is to be decided by the Tribunal. To prevent misconception we make it clear that the reference will have to be heard in the presence of the owners of the acquired premises and after notice to the Collector and in his presence, if he chooses to appear.

The result is that the judgment and decree appealed against are set aside and the case remanded. The parties would bear their respective costs of the appeal. The cost of the further hearing is hereby directed to be in the discretion of the Court below.

S. C. ; R. M. *Appeal allowed : Case remanded.*

Before Mr. Justice A. G. R. Henderson.

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1943.
March, 5.

HOSAINALI RAJ

v.

THE BARISAL RINDAN SAMITY LTD.,

BARISAL TOWN.*

Irregularity—Failure of Court to send the application for execution to the transferred Court.

The failure of the Small Causes Court, which passed the decree, to send the decree to the Court to which the application for execution was transferred (the same officer happened to be presiding in both Courts), is a mere irregularity.

Loke Nath Roy v *Mahim Chandra De* (1) followed.

Appeal by the Judgment-debtor.

Application for execution of decree by the respondent.

The other material facts appear from the judgment.

*Appeal from Appellate Order No. 114 of 1942, against the order of G. K. Nag Esq., Additional District Judge, 2nd Court of Bakurganj at Barisal, dated 21st February, 1942, affirming that of B. B. Bhaduri Esq., Subordinate Judge, 1st Court, Barisal, dated 30th August, 1941.

(1) A. I. R. (1931) Calc. 649.

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v.
The Barisal Rindan Samity Ltd.

March, 5.

Mr. Siris Chandra Dutt for the Appellant.

Mr. Jitendra Nath Guha for the Respondent.

The following judgment was delivered :

Henderson, J. :—This appeal is barred under the provisions of section 102 of the Code of Civil Procedure ; but inasmuch as the ground taken can be equally urged in revision, this is a matter of only academic interest.

The point was argued in the court below as one of limitation though it is equally one of jurisdiction.

The last day for applying for execution was the 11th of May 1941. The application upon which the present execution proceedings are going on was actually filed on the 10th of May 1941. Therefore no question of limitation could possibly arise.

The point of jurisdiction arises in this way. The decree was passed in the small cause court and has been transferred for execution to the ordinary court. I do not think the question of jurisdiction is in any way affected by the fact that at this particular time the same officer happened to be presiding over both the courts. The application for transfer of the decree was made on the 7th of April 1941 before it was barred by limitation.

Under Order 21 Rule 10 an application for execution has to be made by the decree-holder. The question is whether the failure of the court which passed the decree to send it in time is a mere irregularity or whether it affects the jurisdiction. Clearly if the decree was never sent at all, the other court would have no jurisdiction to proceed to execute it.

Now if this were a matter affecting the jurisdiction it would clearly lead to most extraordinary results. Under Order 21 Rule 6 the duty of sending the decree for execution is placed upon the court which is bound to send certain papers and the decree-holder is not in any way responsible for any sort of delays that might take place, and the clerks who had to prepare these papers are in no way under his control. It was decided by a learned Judge of this Court in the case of *Loke Nath Roy* v *Mahim Chandra De* (1) that a matter of this kind is a mere irregularity. I myself am content to follow that decision.

The appeal is dismissed with costs—hearing fee one gold mohur.

A. T. M. *Appeal dismissed.*

(1) A. I. R. (1931) Cal. 644.

CIVIL.
1943.
June, 29, 30
July, 5

Before Mr. Justice A. G R. Henderson.

CHANDRA KUMAR CHOWDHURY

v.

KALA MEAH AND ANOTHER.*

Limitation—Bengal Agricultural Debtors Act (VII B. C. of 1936), section 52—Suit on promissory note.

The plaintiff alleges that he advanced Rs. 149 to the mother of the defendants. She executed a promissory note in his favour. As the stamp was not defaced it could not be admitted in evidence. The plaintiff now seeks to recover on the original transaction :

Held, that the limitation is saved under section 52 of the Bengal Agricultural Debtors Act, the debt being one While the case on the handnote was pending, the plaintiff could not institute an independent suit on the original transaction.

Application for Revision under section 25 of the Small Causes Court Act by the Plaintiff.

The material facts appear from the Judgment.

Mr. Chandra Sekhar Sen for the Petitioner.

Mr. Imam Hossain Chowdhury for the Opposite Party.

C. A. V.

The following judgment was delivered :

July, 5.

This Rule has been obtained by the plaintiff. He alleges that he advanced Rs. 149 to the mother of the defendants. She executed a promissory note in his favour. As the stamp was not defaced it could not be admitted into evidence. The plaintiff now seeks to recover on the original transaction.

The learned Judge delivered a curious judgment. At first he appears to be in favour of the case made by the plaintiff. He then veers round towards the defence. In the end he is unable to make up his mind one way or the other. He solves the difficulty by saying that the plaintiff cannot succeed on the original transaction because he relies on the handnote in his deposition. The contention of the plaintiff is that the suit should be retried.

Mr. Chowdhury opposed the Rule on two grounds. In the first place, he contends that no reliance was placed on the original transaction in the plaint. The document is certainly not very

* Civil Revision Case No. 297 of 1943, against the order of R. K. Das, Esq., Munsiff, 2nd Court, Patiya (Chittagong) (exercising the powers of Court of Small Causes), dated the 23rd November, 1942.

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happily worded. It is, however, difficult to see why the parties bothered to go into evidence if this case was not made in the plaint. It is quite clear that this objection did not occur either to the Judge or to the parties at the trial. Paragraph 1 of the plaint definitely refers to the actual transaction and describes the promissory note as a receipt. There is no substance whatsoever in this objection.

The second ground of opposition to the Rule was that the suit is barred by limitation. It is not disputed that the suit is barred unless the plaintiff can rely upon section 52 of the Bengal Agricultural Debtors Act. In the application under section 8 the plaintiff referred to the promissory note. Mr. Chowdhury's contention is that limitation is saved only with regard to the suit on the note: hence the claim on the original transaction is barred.

Under the provisions of section 52 the plaintiff may exclude (1) the period during which the debt in question is the subject-matter of any proceedings under the Act, and (2) the time during which the person interested in such debt was debarred by any provision of the Act from instituting the suit. In the present case there is not one debt on the handnote and another on the original transaction; the debt is one. While the case on the handnote was pending before the Board the plaintiff could not institute an independent suit on the original transaction. Limitation is accordingly saved under the provisions of this section.

The Rule is made absolute. The decree of the lower Court dismissing the suit is set aside and I direct that it be retried by some other Judge. By consent the trial will take place on the evidence already on the record with such other evidence as either side may see fit to adduce.

Costs in this Rule be costs in the suit—hearing-fee one gold mohur.

A. T. M. *Rule made absolute.*

Before Mr. Justice B. N. Rau and Mr. Justice B. K. Mukherjea.

HEMANTA KUMAR BOSE

v.

JITENDRA NATH PAL AND OTHERS.*

Civil.
1943.
July, 6, 8.

Ejectment—Mesne profits—Lessee—Lease by mortgagor of an English mortgage—Transfer of Property Act (IV of 1882, as amended), section 65A—Lessee's possession, if wrongful.

The purchaser in mortgage sale acquires the property as it existed at the date of the sale discharged of the mortgage lien but subject to the rights of those who were not made parties to the suit and can sue for possession subject to the exercise of right of redemption by such persons. The position would be different if the equity of redemption was wholly unrepresented in the mortgage suit.

Ganga Das Bhattar v. Jogendra Nath Mitra (1); *Sreedeo Singh v. Habibullah Khan* (2); *Nihar Mala Devi v. Sarat Tarini Bhattacharjee* (3) and *Bidhuranjan Sarkar v. Soleman Pramanik* (4) referred to.

A mortgaged certain properties on 23rd December, 1920, in the form of an English mortgage to B, the plaintiff's father. On June 15, 1932, A granted a lease of the property in suit, to defendant No. 1 for a term of 10 years. B obtained a decree on his English mortgage and in execution of this decree purchased the mortgaged properties including the property in suit on 14th March 1939. After purchase, B obtained symbolical possession of the properties in one mode but on attempting to take actual possession he discovered that defendant No. 1 was in possession of the disputed property on the basis of the lease which according to section 65A of the Transfer of Property Act was not binding on the mortgagee. After B's death, the plaintiff, his son and legal representative instituted the present suit praying for ejectment of defendant No. 1 from the property in suit as a trespasser and for mesne profits from him from the date of B's entry on the date of actual delivery of possession :

Held, that the plaintiff was not entitled to get mesne profits as the possession of defendant No. 1 though under a lease not binding on the mortgagee, was not wrongful till the expiry of lease on June 15, 1942.

Appeals by the Plaintiff.

* Appeals from Appellate Decrees Nos. 1126 and 1127 of 1941, against the decrees of S. Ahmed Esq., Subordinate Judge, 3rd Court of 24-Parganas at Alipore, dated 27th May, 1941, reversing those of B. N. Mukherjee, Esq., Munsiff, 1st Court, Sealdah, dated 13th August, 1940.

(1) (1907) 5 C. L. J. 315 ; 11 C. W. N. 403.
(2) (1907) 6 C. L. J. 612.
(3) (1933) 37 C. W. N. 897.
(4) (1941) 73 C. L. J. 378 : 45 C. W. N. 883.

CIVIL.

1943.

Hemanta Kumar Bose v. Jitendra Nath Pal.

Suit for ejectment and for mesne profits (Appeal No. 1126 of 1941) and in the other appeal (Appeal No. 1127 of 1941) suit for accounts against defendant No. 1 for the rents and profits which were appropriated by him from the date when the plaintiff's father obtained symbolical possession down to the date of his death.

Other material facts appear from the judgment.

Messrs. Sitaram Banerjee and *Devabrata Mitra* for the Appellant.

No one for the Respondents.

C. A. V.

July, 8.

The following judgments were delivered:

Mukherjea, J.:—The facts giving rise to these two appeals, which arise out of two analogous suits between the same parties, may be shortly stated as follows:—

One Chunilal Jamadar mortgaged certain properties to the plaintiff's father, Nagendra Kumar Bose, in the form of an English mortgage on December 23, 1929. The amount advanced on the mortgage bond was Rs. 45000. On June 15, 1932, Chunilal granted a lease of the property in suit, which was included in the mortgage, to defendant No. 1 for a term of 10 years, on an annual rental of Rs. 50. Nagendra obtained a decree on the basis of the mortgage instrument and in execution of the same the mortgage properties were put up to sale and they were purchased by him on March 14, 1936. After purchase Nagendra obtained symbolical possession of the properties in due course but on attempting to take actual possession he discovered that defendant No. 1 was in possession of the disputed property on the basis of the lease which being in contravention of section 65 of the Transfer of Property Act was not binding on the mortgagee. Nagendra is now dead and the plaintiff, his son and legal representative, has instituted both these suits. In title suit No. 149 of 1939 the plaintiff claimed to eject defendant No. 1 from the property in suit as a trespasser and to recover mesne profits from him from the date of his father's death till the date of actual delivery of possession. In the other suit which was registered as Title Suit No. 296 of 1940, he prayed for accounts against defendant No. 1 of the rents and profits which were appropriated by the latter from the date when the plaintiff's father obtained symbolical possession down to the date of his death.

Both these suits were contested by defendant No. 1. His substantial defence in suit No. 149 of 1939 was that Chunilal having granted the lease in the ordinary course of manage ment it

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1943.
Hemanta Kumar Bose
v.
Jitendra Nath Pal.
Mukherjea, J.

was binding upon the mortgagee and as a lessee he had the right of redemption in respect of this mortgaged property. As he was not made a party to the mortgage suit his right of redemption was not extinguished and the plaintiff had no present right to dispossess him. In the other suit his defence was that he was not in any sense liable to account to the plaintiff for the rents and profits of the property which he realised and that the suit was not maintainable in law.

The trial Judge overruled the defence in both the suits and decreed them in favour of the plaintiffs. On appeal the judgment was reversed and the lower appellate court has dismissed both these suits. It is against this judgment that these two appeals have been preferred. Second Appeal No. 1126 of 1941 being taken against the decision in Title Suit No. 149 of 1939 whereas Second Appeal No. 1127 of the same year has been filed against the decision in the accounts suit.

As regards Second Appeal No. 1126 of 1941, the only point for consideration is whether the learned Judge was right in holding that as defendant No. 1 was not a party to the mortgage suit, the plaintiff was not entitled to recover possession of the property in the present suit. We may assume for purposes of this case that although the lease was in contravention of section 65A of the Transfer of Property Act and was not binding on the mortgagee nevertheless the lessee had a right of redemption under section 91 of the Transfer of Property Act. We might also agree with the Subordinate Judge that this right of redemption remained unaffected by reason of the lessee not being made a party to the mortgage suit. We do not think however that on that ground alone the present suit can be dismissed. As has been held in a series of decisions of which the cases of *Ganga Das Bhattar* v. *Jogendra Nath Mitra* (1); *Jugdeo Singh* v. *Habibullah Khan* (2); *Nihar Mala Debi* v. *Saroj Bandhu Bhattacharjee* (3) may be taken as examples, the purchaser in a mortgage sale in such cases can acquire the property as it existed at the date of the sale discharged of the mortgage lien but subject to the rights of those who were not made parties to the suit and he can sue for possession subject to the exercise of the right of redemption by such persons. The position undoubtedly would have been different if the equity of redemption was wholly unrepresented in the mortgage suit, but that is not what has happened in the

(1) (1907) 5 C. L. J. 315; 11 C. W. N. 403.
(2) (1907) 6 C. L. J. 612.
(3) (1933) 37 C. W. N. 899.

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Mukherjea, J.

present case [vide the case of *Bidhuranjan Sarkar* v. *Soleman Pramanik* (1)]. The result therefore is that even on the view taken by the Subordinate Judge he would have given the plaintiff a decree for possession subject to the exercise of the right of redemption by defendant No. 1. It has been brought to our notice by Mr. Sitaram Banerji that the lease which was only for 10 years expired during the pendency of this appeal. The lessee therefore has no longer any subsisting interest in the property and he has not appeared before us to contest the appeal. In these circumstances we do not think that any useful purpose would be served by giving him an opportunity to redeem at the present moment.

We accordingly allow this appeal and modify the judgment of the lower appellate court. The plaintiff will be entitled to a decree for khas possession of the land in suit. The prayer for mesne profits however will be dismissed as the possession of defendant No. 1 cannot be said to be wrongful till the lease expired.

As regards the other appeal, we are clearly of opinion that the decision of the court of appeal below is right. As we have said already, the plaintiff is not entitled to claim mesne profits either before or after the death of his father. In these circumstances, we think the lower appellate court rightly dismissed it.

The result is that Second Appeal No. 1127 of 1941 stands dismissed.

As the respondents have not appeared in either of these appeals we make no order as to costs.

Rau. J. :—I agree.

A. T. M. *S. A. 1126 of 1941 allowed.*
S. A. 1127 of 1941 dismissed.

(1) (1941) 73 C. L. J. 578 ; 45 C. W. N. 883.

Before Mr. Justice A. G. R. Henderson.

Civil. 1943. July, 14, 19

FIRM TOKANI PROSAD KAMINIKUMAR PAUL

v.

SHYAMAPADA BANERJEE AND ANOTHER.*

Appeal, if lies—Application in the suit for sale of certain property mortgaged by the surety in the security bond—Procedure to be followed—Civil Procedure Code (Act V of 1908), sections 2, 47, 144, 145 (6).

A right of appeal cannot be founded on the ground of unfairness to parties if there be no appeal.

Order in an application in the suit for sale of certain property mortgaged in the security bond by execution of which the property of the judgment debtor attached before judgment was released does not come either under the definition of decree in section 2, section 47 or under section 144 of the Civil Procedure Code.

The proper procedure to be followed by the plaintiff decree-holder is that laid down in clause (c) of section 145 of the Code of Civil Procedure.

Raj Raghubar Singh v. Jai Indra Bahadur (1) distinguished.

Although it is impossible to enforce the security bond as a mortgage, even if the surety has a right to demand that the property referred to be sold before any other steps were taken in execution, it can be attached and sold in execution proceedings:

As regards an application to amend the petition and convert it into an application for execution:

Held, that the Court should decide whether it could be considered as an application for execution before the date of conversion.

In such a case the decree-holder must rely on the provisions of section 14 of the Limitation Act, if he can bring his case within it.

Appeal by the Plaintiff Decree-holder.

Application in the suit for sale of certain property mortgaged by the surety in the security bond by the execution of which the property of the judgment-debtor attached before judgment was released.

Messrs. Pramatha Nath Mitra and *Khitindra Kumar Mitra* for the Appellant and Petitioner.

*Appeal from Appellate Order No. 179 of 1941, with Application for Revision, against the order of Maulvi Shahabuddin Ahmed, Subordinate Judge of 24-Parganas, 3rd Court, at Alipore, dated the 10th April, 1941, affirming that of S. C. Sen Gupta Esq., Munsif, 2nd Court, Alipur, dated the 3rd December, 1940.

(1) (1919) L. R. 46 I. A. 292.

Messrs. Gopendra Nath Das and *Nagendra Kumar Dutt* for the Respondents and Opposite Party.

C. A. V.

The following judgment was delivered by

Henderson, J. :—This appeal raises a question of procedure. The appellant is the decree-holder. He took proceedings to attach a motor car belonging to the judgment-debtor before judgment. One Nut Behary Das opposed the attachment on the ground that he was a mortgagee. The car was released on the respondents' executing a security bond. The appellant has now filed an application in the suit asking for the sale of certain property mortgaged by the respondent in the security bond. The Munsif rejected the application and an appeal to the District court was dismissed.

The first point for consideration is whether an appeal is at all competent. I may note that there is an alternative application in revision. As the point in dispute can be taken equally well in either, this is chiefly a matter of academic interest. Mr. Mitter has relied on a decision of a Division Bench of the Madras High Court in the case of *S. Ayyaswami Ayyar* v. *Sivakkiammal* (1).

The learned Judges do not state under what provision of the Code such an appeal is competent. If I have understood their judgment correctly, they thought that it would be unfair to the parties if there were no appeal and hence held that there was one. With all due respect to this opinion, it is, in my judgment, impossible to found a right of appeal on any such ground. The case is clearly not within section 47 or section 144 of the Code. The respondent was not and could not be a party to the suit. I find it impossible to bring the order within the definition of a decree. I shall, therefore, deal with the matter on the alternative application.

The procedure adopted by the decree-holder is based on the decision of the Privy Council in the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (2). That was a very unusual case. The surety did not undertake any personal liability. He executed a document charging certain properties in favour of the court. Their Lordships held that section 47 or section 144 could not

(1) (1932) I.L.R. [illegible] 109.
(2) (1919) L.R. 46 I.A. 288.

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1943.

Firm Tokani Prosad Kamini Kumar Paul v. Shyamapada Banerjee.

Henderson, J.

apply. No suit could be brought as there was no person competent as mortgagee to institute a suit. In these circumstances, the only mode of enforcing it was for the court itself to make an order in the suit on an application to which the sureties were parties for the sale of the property.

The present case comes within the terms of section 145 (c) of the Code. Mr. Mitter contended that the personal liability was only contingent. In my judgment, this would be an unnatural interpretation of the bond. The surety made himself personally liable upto Rs. 1,600, and in addition, mortgaged certain properties as security. Then, in the second place, although it is impossible to enforce the bond as a mortgage, even if the surety has a right to demand that the property referred to be sold before any other steps are taken in execution, it can be attached and sold in the execution proceedings.

Finally, Mr. Mitter asked that he might be allowed to amend the petition and convert it into an application for execution in order to avoid difficulties with regard to limitation. Even so, the court would have to decide whether it could be considered as an application for execution before the date of conversion. This is a case in which the decree-holder must rely upon the provisions of section 14 of the Limitation Act, if he can bring his case within it.

The appeal is dismissed as incompetent, with costs,—hearing-fee one gold-mohur.

The application is rejected.

A. T. M. *Appeal and Application for Revision dismissed.*

Before Mr. Justice B. N. Rau and Mr. Justice C. C. Biswas.

NIRODHINI (*alias*) NIRODI SANGAMA

v.

NANDA SANGAMA AND OTHERS.*

CIVIL.

1943.

July, 15, 16.

Inheritance—Custom—Garos of Mymensingh—Motherhood—Appointment by members of the clan—Plaintiff to show better title.

The law of inheritence amongst the Garos of Mymensingh is that upon the death of a widow her property goes to her daughters, if any, and in their absence to another woman of the clan appointed by some of its members.

Major Playfair's monograph on "The Garos", 1909, referred to.

A acquired certain lands by his personal labour as well as with borrowed money. Upon his death, they passed to his widow, who died leaving sons, two sisters and a sister's daughter. A suit was brought by one of the sisters and sister's daughter, claiming the estate on the allegation that they are entitled to it in preference to the sons of the deceased under Garo custom:

Held, that the suit fails, as neither of the plaintiffs claims to have been appointed by some of the members of the clan, though it may be that according to Garo custom no man can inherit property under any circumstances whatever. The plaintiffs have to prove a better title than the sons of the deceased.

Appeal by the Plaintiff No. 1.

Messrs. Birendra Kumar De and *Gopesh Chandra Chatterjee* for the Appellant.

Dr. N. C. Sen Gupta and *Mr. Satya Priya Ghose* for the Respondents.

The following judgments were delivered:

July, 16.

Rau, J.:—The only question in this second appeal is as to the customary rule of inheritance amongst the Garos of Mymensingh. The facts are simple. The parties belong to the Sangama clan or sect of the plains Garos of the Mymensingh District as distinguished from the hill Garos. One Kanai acquired certain lands by his personal labour as well as with borrowed money. There is no dispute now that upon his death they passed to his widow, Indramoni, who however died later the same day, leaving some sons, two sisters and a sister's daughter. Plaintiff No. 1 is one of the sisters and plaintiff No. 2 is the daughter of the other sister. They claim the estate alleging that they are entitled to

*Appeal from Appellate Decree No. 1171 of 1940, against the decree of Babu Probodh Chandra Ghose, Subordinate Judge of Mymensingh, 2nd Court dated 8th May, 1940, affirming that of Sailendra Nath Chatterjee Esq., Munsif, 4th Court, Netrokona, dated 30th September, 1939.

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Rau, J.

it in preference to the sons of the deceased under Garo custom. Both the courts below have dismissed the suit. The finding of the lower appellate court as to the oral evidence in the case is this: "The evidence of the witnesses examined by both sides does not seem to be quite reliable on the question of the customary law on the point. Their knowledge is not derived from sufficient actual experience or from authoritative books or from any strong tradition and the oral evidence on this point is very meagre." We are thus driven to other sources. Three authorities have been cited before us on behalf of the plaintiff appellant.

The first is Major Playfair's monograph on "The Garos", 1909. After pointing out that the Garos are divided into certain clans or "motherhoods", the author goes on to describe the law of inheritance in these terms: "The law of inheritance may be briefly stated to be, that property once in a motherhood, cannot pass out of it. A woman's children are all of her *machong* (motherhood), and therefore it might at first appear that her son would satisfy the rule; but he must marry a woman of another clan, and his children would be of their mother's step, so that, if he inherited his mother's property, it would pass out of her *machong* in the second generation. The daughter must therefore inherit, and her daughter after her, or failing issue, another woman of the clan appointed by some of its members".

Applying these rules in the present case it would follow that upon Indramoni's death her property would have gone to her daughters, if she had any. But as she had no daughters, the property would devolve upon another woman of the clan appointed by some of its members. Neither of the plaintiffs in this suit claims to have been so appointed by any members of the clan. It may be that according to the Garo custom no man can inherit property under any circumstances whatever; nevertheless this does not assist the plaintiffs, because they have to prove a better title than the sons of the deceased, which they have not succeeded in doing.

The next authority cited before us is a small publication on Garo law by the Reverend C. D. Baldwin, dated 1933. The author is an Australian Baptist Missionary of the Mymensingh District and does not himself claim his work to be authoritative. Even so, what he says on the subject does not assist the plaintiffs. This is what he says: "It should be remembered that no Garo man can own property. In the matriarchal system which exists

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whatever a Garo boy may earn or receive, whether he be of age or not, is really the property of his mother or sister. Should he marry, whatever he gets will become his wife's property, or, after her death that of her daughter. In the event of his mother's death or that of his wife or daughter or sisters, as the case may be, the property will become that of the nearest maternal woman relation." According to this rule, if Kanai had died without leaving a mother or wife or daughter or sisters surviving him, his property would have devolved upon his nearest maternal woman relation. But the rule is of no assistance to us in the present case for the purpose of deciding who inherited Indramoni's property upon her death.

Finally the plaintiff appellant cited the Bengal District Gazetteer of Mymensingh by Mr. (now Sir) Frederick A. Sachse. There is only one short paragraph on inheritance in this book which is of no assistance in the present case. For further information the author refers the reader to Major Playfair's monograph which we have already mentioned.

The result is that neither on the oral evidence produced nor on the authorities cited have the plaintiffs succeeded in establishing their own title to the disputed property.

The appeal must therefore be dismissed with costs.

Biswas, J. :—I agree.

A. T. M. *Appeal dismissed.*

Before Mr. Justice A. G. R. Henderson.

ACHIRAN BIBI AND OTHERS

v.

BABUR ALI SAPUI (*alias*) BABUR ALI SIPAI.*

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1943.
July, 28.

Second appeal—If lies—Order setting aside the order of primary Court that the Court was without jurisdiction in making a reference to arbitration—Procedure.

There was a reference to arbitration while Schedule II of the Code of Civil Procedure was still in force. The primary Court made a decree in

*Appeal from Appellate Decree No. 622 of 1941, with Application, against the decree of Babu P. N. Gupta, Additional Subordinate Judge of 24-Parganas, 2nd Court, at Alipore, dated 19th February, 1941, reversing that of Babu A. B. Syam, Munsif, 1st Court, Baruipore, date 23rd September, 1940.

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1943.

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v.
Babur Ali Sapui.

accordance with the award. On appeal by the plaintiff, the lower appellate Court set aside the order on the ground that the reference to arbitration was without jurisdiction :

Held, that no second appeal lay. The remedy of the party was to apply to the High Court under section 115 of the Code of Civil Procedure to set aside an order of the lower appellate Court as being without jurisdiction.

That no appeal lay to the lower appellate Court.

Ghulam Khan v. *Muhammad Hassan* (1) followed.

That it was not enough for the petitioner in revision to show merely that the order of the lower appellate Court was made without jurisdiction. He must further show that the appellant in the lower appellate Court would have failed, if instead of filing an incompetent appeal, he had applied in revision under section 115 of the Code of Civil Procedure.

Appeal and Application for Revision by the Defendants.

The suit was in connection with a boundary dispute.

The material facts appear from the judgment.

Mr. Bibhuti Bhusan Bhattacharjee for the Appellants as well as for Petitioners.

Messrs. Nitya Ranjan Biswas, Prafulla Chandra Nag and *Srijit Kumar Ganguly* for the Respondent as well as for the Opposite Party.

The following judgment was delivered :

July, 28.

Henderson, J. :—This appeal is by the principal defendants Nos. 1 to 6. There was a reference to arbitration while Schedule II of the Code of Civil Procedure was still in force. The Munsif made a decree in accordance with the award. The plaintiff appealed. The Subordinate Judge set aside the order of the Munsif on the ground that the reference to arbitration was without jurisdiction. The contention of the appellant is that the appeal in the Lower Appellate Court was incompetent.

There has been a great divergence of judicial opinion on the question whether in such cases a second appeal lies. Until the matter is settled one way or the other by a Full Bench, parties will be compelled to file both an appeal and an application in revision in every case. That has been done in the present case.

My own view is, as I have stated previously on many occasions, that no appeal lies. I find it difficult to persuade myself that a second appeal can be created by something done in a District Court without jurisdiction of any kind. One of the main reasons for the enactment of section 115 of the Code is to deal

(1) (1901) I. L. R. 29 Calc. 167 ; L. R. 29 I. A. 51.

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with matters of that kind. Parties are entitled to ask the Court to interfere under section 115 and set aside an order made by an appellate Court without jurisdiction.

The question therefore is whether the appeal in the Lower Appellate Court was competent. Unfortunately on this point too there has been a conflict of judicial opinion. The main objection to the decree of the Munsif was that the reference to arbitration was without jurisdiction. The conflicting views are illustrated in the judgments given by Mukerji, J and Mitter, J in the case of *Golenur Bibi* v. *Abdus Samad* (1). In view of the opinions of the other High Courts the weight of authority is certainly in favour of the opinion expressed by Mukerji, J. It appears to me to be set at rest by the decision of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (2). That decision dealt with the provisions of section 522 of the Code before amendment, which provided that no appeal shall lie from any such decree except in so far as the decree is in excess of or not in accordance with the award. Their Lordships pointed out that it would be doing violence to the plain language and the obvious intention of the Code to hold that an appeal lies on other grounds. These observations apply with equal force to the provisions of Schedule II, Paragraph 16.

Now it is not enough for the petitioners in revision to show merely that the order of the Lower Appellate Court was made without jurisdiction. They must go further and show that the plaintiff would have failed if, instead of filing an incompetent appeal, he had applied to this Court in revision under section 115.

I am quite satisfied that the learned Judge was right when he said that the reference to arbitration was invalid. It was made on the application of the plaintiff and defendants Nos. 1 to 6. The suit is in connection with a boundary dispute. The plaintiff has purchased a certain plot south of Dag No. 2557 in execution of a decree. His case is that the principal defendants are in actual possession of plot No. 2557 and have encroached on his plot. The point that had to be settled was the boundary between Dag No. 2557 and the plot purchased by the plaintiff.

The pro-forma defendants Nos. 10 to 14 were the common landlords of both the plots. Defendants Nos. 1 to 6 apparently deny that defendants Nos. 7 to 9 have any interest in plot

(1) (1930) I. L. R. 58 Calc. 628.

(2) (1901) I. L. R. 29 Calc. 167; L. R. 29 I. A. 51.

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No. 2557. Defendants Nos. 7 to 9 however were impleaded on an allegation that they are co-sharers with defendants Nos. 1 to 6. They filed a written statement in which they alleged that they are co-sharers but they denied that they themselves were personally liable for the encroachment, if any. It is thus quite plain that all the parties to the suit are interested in the boundary line between plot No. 2557 and the plaintiff's plot. It was therefore necessary for them all to join before the case could be brought within the terms of Schedule II, paragraph 1.

The only question therefore that remains is whether I would have been prepared to interfere under section 115 at the request of the plaintiff. I should certainly have interfered on an application by any of the defendants Nos. 7 to 14. Mr. Bhattacharjee however pointed out that the plaintiff was a party to the reference to arbitration, that he took part in it and that he lost it and is now trying to back out of it. In these circumstances I should not have been prepared to help him in revision.

The appeal is dismissed as incompetent.

In revision I set aside the order of the Subordinate Judge and restore that of the Munsif.

I make no order as to costs (either in appeal or in revision) in this Court or in the Lower Appellate Court.

A. T. M. *Second appeal dismissed:*
Rule made absolute.

CRIMINAL REVISION,

Before Mr. Justice N. G. A. Edgley and Mr. Justice A. N. Sen.

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1943.

March, 16, 17.

DWIJAPADA SINHA

v.

BRAHMAPADA GHOSE

AND CONNECTED REVISION PETITION.

Criminal breach of trust—Criminal misappropriation—Owner of property—Contract of sale.

The petitioner Dwijapada is an employee in the firm of Ghosh & Co., who are brick makers and part of his duties consists in writing some of the books

* Criminal Revision Cases Nos. 790 and 794 of 1942, against the orders of S. Wazid Ali Esq., 3rd Presidency Magistrate, Calcutta, dated 31st July, 1942.

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of the firm. The other petitioner Nagendra is the sole proprietor of the firm Dutt & Co. who deals with building materials. It is alleged that Ghosh & Co. on certain dates sent bricks to Dutt & Co. which Dutt & Co purchased. The latter refused to pay for them on the ground that they had never received those bricks. Evidence was given as to receipt of bricks by Nagendra Evidence also was given that the petitioner Dwijapada did not enter these deliveries in certain books of the firm Ghosh & Co. and the suggestion apparenty is that this was done in collusion with the petitioner Nagendra. On those facts Dwijapada was tried on a charge of criminal breach of trust with respect to some bricks and Nagendra with abetting him in the commission of that offence. The conviction, however, was under different sections :

Held, there cannot be any criminal breach of trust or criminal misappropriation in respect of the bricks, inasmuch as the bricks became the property of Nagendra as soon as they were appropriated to the contract of sale between Ghosh & Co and Dutt & Co.

Application for Revision under section 439 of the Code of Criminal Procedure.

Messrs. S. S. Mukherjea, Bhupendra Nath Mukherjee and *Gautam Nath Chatterjee* for the Petitioner Dwijapada in No. 790.

Messrs. N. K. Basu and *Ajoy Kumar Basu* for the Petitioner Nagendra in No. 794.

No one for the Opposite Party in No. 790.

Messrs. Probodh Chandra Chatterjee and *Pashupati Bhattacharjee* for the Opposite Party in No. 794.

C. A. V.

The following judgments were delivered :

March, 17.

Sen, J. :—These two Rules have been obtained by Dwijapada Sinha and Nagendra Nath Dutt. Dwijapada Sinha was tried on a charge of criminal breach of trust with respect to some bricks and Nagendra Nath Dutt was charged with abetting him in the commission of that offence. The conviction, however, was under different sections. Nagendra Nath Dutt has been convicted of having committed criminal misappropriation with respect to the aforesaid bricks and sentenced to pay a fine of Rs. 200. Dwijapada Sinha has been convicted of abetting the aforesaid criminal misappropriation and sentenced to six months' rigorous imprisonment.

The case for the prosecution briefly is this : There is a firm known as Ghose & Company who are brickmakers. Dwijapada Sinha is an employee of the aforesaid firm and part of his duties

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consists in writing up some of the books of the firm. Dutt & Company is a firm dealing in building materials and the petitioner Nagendra Nath Dutt is the sole proprietor of that firm. These two firms had previous dealings, Ghose & Co. selling bricks to Dutt & Co. It is alleged that in the course of these transactions Ghose & Co. on certain dates sent bricks to Dutt & Co. which Dutt & Co. had purchased. Later Ghose & Co. sent a bill for the price of those bricks. Dutt & Co. refused to pay the bill on the ground that they had never received those bricks. These are the main facts upon which the prosecution is based. Evidence was given to show that Nagendra Nath Dutt himself received the bricks, signed the Chalan showing receipt and paid certain expenses in connection with the delivery of the bricks. It is said that these Chalans or receipts have disappeared. Evidence has also been given that the petitioner Dwijapada Sinha had not entered these deliveries in certain books of the firm Ghose & Co. and the suggestion apparently is that this was done in collusion with the petitioner Nagendra Nath Dutt.

Now, upon these facts we find it extremely difficult to understand how a charge of criminal breach of trust could have been framed or how the conviction in a charge of criminal misappropriation can be supported. If the case for the prosecution be true, then the bricks became the property of Nagendra Nath Dutt as soon as they were appropriated to the contract of sale between Ghose & Co. and Dutt & Co. In this connection I would refer to section 20 of the Indian Sale of Goods Act. The bricks being the property of Nagendra Nath Dutt there could be no criminal breach of trust or criminal misappropriation in respect thereof. It may be that the petitioner have committed some other offence but it is difficult to appreciate upon the evidence adduced what other offence could have been committed by them and they cannot possibly be convicted of some other offence without their being given notice of what that offence is. The learned Magistrate apparently found some difficulty in coming to his conclusion regarding the offence committed. He arrived at no clear finding on this matter. All that he says is this :—

"The two accused have obviously been doing in the eye of the complainant to make a little extra income for themselves."

We are not aware that a finding of this description can be the basis of any conviction in a criminal case.

In these circumstances we must set aside the convictions

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Sen, J.

and sentences passed upon the petitioners : and direct their acquittal.

The fine, if paid, shall be refunded.

If in custody, the petitioners shall be released forthwith.

The Rule for enhancement is discharged.

Edgley, J. :—I agree.

A. T. M. *Conviction set aside :*
Rule for enhancement discharged.

PRIVY COUNCIL.

PRESENT : *Lord Porter, Lord Justice Goddard and Sir Madhavan Nair.*

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1944.

July, 4.

VENKATARAMANA AYYAR AND ANOTHER

v.

NATESA PILLAI AND OTHERS.

Code of Civil Procedure (Act V of 1908), Order 21, Rules 67, 69, 70—Sale fixed on a certain date continued from day to day—Application for stay of sale on ground of insolvency dismissed—Appeal to District Judge and interim stay—Agreement for continuing the sale from day to day till the date of disposal—Executing Court informed of the agreement and costs put in for continuing the sale—Order by Executing Court made after the date fixed for sale—Sale on the last date fixed by agreement on dismissal of appeal, if illegal or irregular—Necessity for fresh sale proclamation.

The 1st appellant obtained a decree against the respondents and in an execution proceeding the date of sale was fixed on the 8th July but as no bid was forthcoming on that date, the sale was by order of Court continued from day to day down to 20th July and on that date an order was made directing the sale to be continued till the 5th August. Meanwhile the respondents made an unsuccessful application to the Executing Court to stay the sale on the ground of insolvency but the application having been dismissed an appeal was filed on the 2nd August to the District Judge. Before the Court of District Judge an agreement was entered into between the Advocates of parties with regard to application for an interim stay to the effect that the sale would be continued till the 12th August on which date the appeal was due to be

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heard. On the 5th August the decree-holder informed the Executing Court of the agreement and paid the necessary fee for continuing the sale till the 12th August. No order for continuance of the sale was made on the 5th August (date fixed for the sale) but on the 8th August the executing Court made an order that the sale be continued till the 12th August. On the 12th August, the appeal was dismissed and the property was sold at a fair price to the 2nd appellant :

Held (1) That in view of the agreement of the 3rd August and the order of 8th August which effectively continued the sale till the 12th August there was no material irregularity in the proceeding still less an illegality.

(2) That no fresh proclamation was necessary as the sale continued from day to day and was never adjourned.

Privy Council Appeal No. 30 of 1942 by the Decree-holder and Auction-purchaser against the judgment and decree of High Court of Madras reversing those of the Subordinate Judge of Mayavaram.

Application for setting aside sale.

The material facts will appear from the judgment.

Their Lordships' judgment was delivered by

July, 4.

Lord Justice Goddard:—This appeal arises out of an application by the respondents, who are judgment-debtors to set aside the sale of certain lands belonging to them sold under an order of the Court and which were bought by the second appellant. The application was made in first instance to the Subordinate Judge of Mayavaram, who refused it ; on appeal, the High Court of Madras reversed his decision and set the sale aside on the ground that it took place on a date subsequent to the latest date prescribed by the Court for the sale and was therefore illegal.

There is no dispute as to the facts which can be quite shortly stated. The 1st appellant had obtained judgment against the respondents for something over Rs. 25,000 and interest. He applied to the Court for an order by way of execution for the sale of the respondents' lands and on 8th April 1935, the Subordinate Judge made the order and directed a proclamation of sale to be made and fixed the date of sale for 8th July. The sale was duly proclaimed but on the day fixed for the sale no bid was forthcoming and the sale was by order of the Court continued from day to day down to 29th July and on that day an order was made directing the sale to be continued till 5th August. Meanwhile on 7th July the respondents had made an application to the Court to stay the sale on the ground that he was insolvent. The Subordinate Judge had dismissed the application on 10th July. On 2nd August, three days before the day fixed for closing the

sale, the respondents filed an appeal to the Court of the District Judge against the refusal to stay the sale and in his petition he asked that an interim stay might be ordered pending the disposal of his petition. The next day, 3rd August, an agreement was made with regard to the application for an interim stay between the Advocates of the respective parties which was duly endorsed on the petition. It was in these terms: "On behalf of the decree-holder I (that is the Advocate for the decree-holder) undertake to have the execution sale carried on from day to day till 12th instant." The endorsement by the respondents' Advocate was "In view of the undertaking of the respondent I do not now press this petition." Nothing could be clearer than this. The parties agreed that the sale was to be continued from 5th August to 12th August on which date the appeal was due to be heard as it in fact was. On the same day, 5th August, the appellants' pleader lodged a memo, in the Court of the Subordinate Judge, reciting the agreement and paid the necessary fee for continuing the sale for one week from that date. It does not appear that any order of the Court was made on that date for the continuance of the sale, and their Lordships assume that none was made, but on 8th August the Subordinate Judge did make an order that the sale be continued till 12th August, which was in accordance with what the parties had agreed. On that date the appeal was dismissed and the property was thereupon sold to the 2nd appellant at a price which both Courts below have found to be the full value: so the respondents have in any case sustained no injury. They then applied to the Subordinate Judge for an order setting aside the sale, apparently on the grounds that it was illegal for the sale to have taken place on 12th August when by the order of 29th July the 5th August had been appointed as the latest day for closing the sale and also on the ground that there had been no proclamation of the sale for 12th August. The Subordinate Judge, as already stated, refused this application, but the High Court in reversing his decision held that the sale was entirely illegal. In this judgment they said:—

"But there was no sale on 5th August. Nor was the auction closed on that date. On that day, the decree-holder represented that the auction sale should be continued for another week and deposited Rs. 3-8 for the expenses of conducting the sale on seven more successive days. The Court passed no order on this request other than an order that the money so paid should be accepted..... The Court's action in not selling the property on 5th August or concluding the sale on that day was highly irregular inasmuch as

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it had been widely proclaimed that that was the latest date of sale. Its action in selling the property on a date subsequent to that date was positively illegal."

It will be observed that the High Court make no reference to the agreement between the Advocates of the respective parties for the continuance of the sale but appear to treat the matter as though the appellants' representative had obtained ex-parte a continuance of the sale. Nor do the Court make any reference to the order of 8th August and their Lordships can only suppose that these two important facts were not brought to the attention of the Court as they cannot think that, had they been, the appeal would have been allowed. In view of the agreement and the order of the Court their Lordships are unable to see that there was any material irregularity in the proceedings, still less any illegality. It was contended before the Board that as no order for the continuance of the sale was made on 5th August, the order of 8th August was too late and therefore ineffective but their Lordships cannot accept that argument. Even assuming that in view of the agreement between the parties any order was necessary, and it is not to be taken that in their Lordships' opinion it was, they are of opinion that the agreement come to on 3rd August, coupled with the order of 8th August, effectively continued the sale to 12th August. It may be observed that the sale was never adjourned; it was all along continued from day to day and consequently no fresh proclamation ever became necessary.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the order of the High Court set aside with costs, and the order of the Subordinate Judge restored. The respondents will pay the costs of the appeal.

A. K. D. G.

Appeal allowed.

FEDERAL COURT.

F. C.
1944.
December, 12.

PRESENT : *Sir Patrick Spens, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

THE BANK OF COMMERCE LTD., KHULNA

v.

NRIPENDRA NATH DATTA.

AND THREE OTHER CONNECTED APPEALS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Ultra Vires—*Bengal Money Lenders Act (X B. C. of 1940), sections 30, 36, if valid and operative.*

Sections 30 and 36 of the Bengal Money Lenders Act are valid and operative. These sections are severable from the rest of the Act. The Bengal Money Lenders Act is in some respects at least *ultra vires* of the provincial legislature : *Amulya Krishna Basu's* case (1).

Entry 38 of List I, Schedule VII of the Constitution Act is limited to laws which affect the conduct of the business of bank *qua* banks, and hence sections 30 and 36 of the Bengal Money Lenders Act are valid and the liabilities of the debtors are fixed with reference to the provisions of these sections.

Federal Court Civil Appeals Nos. I to IV of 1944.

Mr. P. C. Basu, Senior Advocate, Federal Court (Mr. Sris Chandra Dutt, Advocate, Federal Court, with him) instructed by Mr. Ganpat Rai, Agent for the Appellant.

Mr. S. M. Bose, Advocate-General of Bengal (Mr. K. K. Basu, Advocate, Federal Court, with him) instructed by Mr. B. Banerji, Agent, intervened on behalf of the Province of Bengal for the Intervener.

The Respondents did not enter appearance.

The following judgment was delivered by

December, 12.

Spens, C. J.:—In this batch of appeals also, the question for decision relates to the validity and operation of sections 30 and 36 of The Bengal Money-Lender's Act, 1940. In these cases however, the lender's rights, though based on promissory notes, had passed into claims under decrees before the enactment of the Act. They are thus *ad idem* with *Amulya Krishna Basu's* Case (1). In the ordinary course, we should have contented ourselves with merely following that decision. But, as in the

(1) [1944] F. C. R. 186.

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connected batch (Civil Appeals Nos. V to XI of 1944) we have held that the Act is in some measure invalid, a further contention which was left open in *Amulya Krishna Basu's* Case (1) must be considered, *viz.*, that if the Act is in some respects at least *ultra vires* the provincial legislature, it must be held to be wholly invalid. We are of the opinion that in the present case, the part of the Act which we have held to be invalid is severable from the rest of the Act and that the Act cannot be held to be wholly void.

It was next contended that certain provisions in the Act which affect banks were also *ultra vires* the provincial legislature as interfering with the matter of entry 38 of List I, "banking, that is to say, the conduct of banking business by corporations." Attention was in this connection drawn particularly to the provisions of section 2 clauses (1) and (12) (*d*) and sections 3, 8 and 13. Relying upon the decision of the Judicial Committee in *Tenant* v. *Union Bank of Canada* (2), counsel for the appellant argued that these sections constituted a serious interference with the conduct of banking business in the province. These provisions however do not directly affect the present case as the decrees to which they relate had been obtained before the passing of the Act. The question of their invalidity is raised here only to support the argument, that if some portions of the Act are invalid the legislation as a whole must be held to be invalid. In the view that we have already expressed on the question of severability, which we should have no difficulty in applying to the provisions in question here, we are not prepared to accept this contention. We accordingly express no opinion on the question whether these particular sections are valid or not.

The validity of sections 30 and 36 of the Act was also impugned on the ground that even these provisions affect the subject of "banking". As the liabilities of the debtors in these cases have been fixed with reference to the provisions of these sections it is necessary to deal with this contention separately. Our attention was drawn in this connection to certain observations of Duff C. J. in *Reference as to Validity of the Debt Adjustment Act, Alberta* (3). A number of objections to the validity of the legislation then in question were considered by the Supreme Court in that case, but when the matter went on appeal to the Judicial Com-

(1) [1944] F. C. R. 131.
(2) [1894] A. C. 31.
(3) [1942] S. C. R. (Can.) 31.

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mittee in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), their Lordships dealt with only one objection (not relevant to the present case) and expressed no opinion on the other points. It has been argued before us that as the application of sections 30 and 36 of the Act will greatly reduce the amount which a bank can recover in execution of decrees obtained by it, these provisions must be held to constitute a serious interference with the conduct of banking business. This contention seems to us to rest on an unduly wide interpretation of the expression "conduct of banking business". A law of limitation or a law relating to the compulsory acquisition of land may affect the rights of a bank just as they may affect the rights of other suitors or property-owners. It would be too much to say that every law, which in its operation might affect the property or interests of a bank just as it affects the property or interests of other persons, would constitute an encroachment on entry 38 of List I. On a reasonable construction, the entry must be limited to laws which affect the conduct of the business of banks *qua* banks. In this view, we must overrule this last objection to the validity of these sections.

The appeals fail and are dismissed. As the respondents have not appeared, there will be no order as to costs.

Leave to appeal to His Majesty in Council granted

A. T. M. *Appeal dismissed.*

(1) [1943] A. C. 356.

PRESENT: *Sir Patrick Spens, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

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M. L. BANNERJEE

v.

THE KING-EMPEROR.

AND ANOTHER CONNECTED APPEAL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Sanction—Criminal Procedure Code (Act V of 1898), section 197—"An authority higher than a Provincial Government"—G. H. Q.

The expression "an authority higher than a Provincial Government" in section 197 of the Code of Criminal Procedure has reference to the Gov-

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tral Government, the Governor-General and the Secretary of State ; G. H. Q. is thus not an higher authority.

Federal Court Criminal Appeals Nos. VIII and IX of 1944.

Mr. J. P. Mitra, Senior Advocate, Federal Court, (Mr. S. N. Mukherjee, Advocate, Federal Court, with him) instructed by Mr. Ganpat Rai, Agent for the Appellant in Criminal Appeal No. VIII of 1944.

Sardar Raghbir Singh, Advocate, Federal Court, instructed by Mr. Ranjit Singh Narula, Agent for the Appellant in Criminal Appeal No. IX of 1944.

Sir B. L. Mitter, Senior Advocate, Federal Court, (Mr. K. K. Raizada, Advocate, Federal Court, with him) instructed by Mr. B. Banerji, Agent for the Respondent in both Appeals.

The following judgment was delivered by

December, 13.

Spens, C. J. :—These two appeals may be disposed of together. The appellant in Criminal Appeal No. VIII of 1944, Bannerjee, was in December 1942 officiating Goods and Yard Supervisor at Sealdah, which is the Calcutta terminus of the Bengal-Assam Railway, and the appellant in Criminal Appeal No. IX of 1944, Bhattacharjee, was at that time Shed Inspector at Sealdah. Bannerjee was then holding an Emergency Commission as a Second Lieutenant and Bhattacharjee had been made a Warrant Officer. They were charged under section 161 read with section 34 of the Indian Penal Code, with having received from Dud Nath Pandey (P. W. 2) on the 31st December, 1942, the sum of Rs. 250 as a motive or reward for allotting to the Firm on whose behalf Pandey represented himself to be acting, a wagon for the transportation of bales of cloth from Sealdah to Kisenganj. They were convicted by the Additional District Magistrate, 24 Purganas, and each of them was sentenced to undergo one year's R. I. and to pay a fine of Rs. 500 and in default of payment of fine to suffer further rigorous imprisonment for three months. Their appeals to the Sessions Judge, 24 Purganas, and their Revision Application to the Calcutta High Court were dismissed. From the judgment of the High Court these appeals were preferred, supported by the usual certificate under section 205 of the Constitution Act.

The constitutional question raised on behalf of the appellants before the High Court under section 270 (1) of the Constitution Act was not sought to be re-agitated before us. It was conceded that it was concluded by the judgment of this Court in *Hanlig's*

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Case (1). Some attempt, similar to that in *Afzalur Rehman's* Case (2), was made to raise a constitutional point on the construction of sections 240 and 241 in order to support an argument really bssed on section 197 of the Criminal Procedure Code, that the cases must fail for lack of the necessary sanction under that section, inasmuch as the appellants were public servants who were not removable from their office save by or with the sanction of an authority higher than a Provincial Government, and the offence with which they were charged was alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

The appellants have in our judgment failed to establish that they were public servants who could be removed from their office only by some authority higher than a Provincial Government. The only evidence on the record on that point is a statement by P. W. 4, Mozumdar, who is a District Traffic Superintendent on the Bengal Assam Railway, to the effect that the Goods Supervisor and the Shed Inspector are subordinate to the Chief Transportation Manager and the Chief Commercial Manager who can jointly dismiss them. It was suggested that these officers, being officers of the Central Government, were "an authority higher than a Provincial Government". We are unable to accept this suggestion. To construe this expression as meaning any officer of the Central Government would lead to patent absurdities. Having regard to the juxtaposition in which this expression occurs in section 197 of the Criminal Procedure Code and the history of the enactment, we consider that the expression has reference to the Central Government, the Governor-General and the Secretary of State.

It was contended on behalf of Bannerjee that he had been given a Commission as Second Lieutenant by virtue of his position as a Goods and Yard Supervisor and that as he could be deprived of his Commission only by G. H. Q. he could not be removed from his office of Goods and Yard Supervisor except with the sanction of G. H. Q. which was an authority higher than a Provincial Government. Beyond the fact that in December 1942, Bannerjee held an Emergency Commission as a Second Lieutenant there is not a word on the record to indicate that he could not be dismissed from his office of Goods Supervisor without the sanction of G. H. Q. Nor are we inclined to accept the

(1) [1944] F. C. R. 262.
(2) [1943] F. C. R. 7.

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proposition that "G. H. Q." (whatever that expression might signify) is an authority higher than a Provincial Government within the meaning of section 197 of the Criminal Procedure Code.

A similar contention was sought to be raised before us on behalf of Bhattacharjee, but counsel realising that his case could not in this respect stand on any higher footing than that of Bannerjee, did not press the point. That may also be the reason why this point was not taken on his behalf before the High Court.

In our judgment it has not been established that the appellants are within the class of public servants to whom the provisions of section 197 of the Criminal Procedure Code would be applicable. In this view of the matter it is unnecessary to determine whether the offence with which they were charged was or was not alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

We were, with our leave, also addressed on behalf of the appellants on the merits, but nothing that was urged before us served to raise any doubt in our minds with regard to the correctness of the findings of the Courts below. The evidence clearly establishes the guilt of the appellants beyond any reasonable doubt and the sentences are, in our judgment, appropriate. These appeals are dismissed.

A. T. M. *Appeals dismissed.*

PRESENT : *Sir Patrick Spens, Chief Justice, Mr. Justice S. Varadachariar, and Mr. Justice Zafrulla Khan.*

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THE BANK OF COMMERCE, LTD., KHULNA

v.

KUNJA BEHARI KAR AND ANOTHER.*

AND 6 OTHER CONNECTED APPEALS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Ultra vires—*Bengal Money-Lenders' Act (X B. C. of 1940), sections 30, 36 and 38—Constitution Act, section 100—Entry 28, List I and Entry 10, List III—Incidental encroachments of List I subject.*

Sections 30, 36 and 38 of the Bengal Money Lenders' Act are *ultra vires* the provincial legislature as to claims under promissory notes.

By making sections 30, 36 and 38 of the Bengal Money-Lenders' Act, 1940, applicable to claims under promissory notes, the Act is an innovation of entry 28 in List I of the Seventh Schedule to the Constitution Act : they affect sections 32, 79 and 80 of the Negotiable Instruments Act substantially. The attack against the above sections of the Bengal Money-Lenders' Act, 1940 will not be met by treating them as legislation with respect to "Contracts" (entry 10 of List III) as sub-section (2) of section 100 of the Act makes even legislation on List III matters subject "to the preceding sub-section", whenever such legislation is enacted by a provincial legislature.

Mere incidental encroachments on a List I subject by a provincial legislature will not amount to a transgression of the prohibition imposed on the provincial legislature by sub-section (1) of section 100 of the Constitution Act : *Gallaghar* v. *Lynn* (1) (per Lord Atkin).

Sub-section (1) of section 100 of the Constitution Act expressly denies power to the provincial legislature to make laws with respect to any of the matters enumerated in List I.

It would not be sufficient if the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List : their incidental character must be determined with reference to their relation to the subjects enumerated in List I : *Attorney-General for Alberta* v. *Attorney-General for Canada* (2).

The decision depends upon the determination of the question whether the provisions of the impugned Act encroach upon List I subjects to any substantial extent or whether the interference is only incidental. Thus the question whether the provincial enactment is or is not *ultra vires* must be determined in each case as it arises.

(1) [1937] A. C. 863 (869-870).

(2) [1943] A. C. 356.

*This case therefore overrules *Mohini Ranjan* v. *Surendra Chandra*, (1941) 74 C. L. J. 58.

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The question of the validity of the provincial legislature with respect to a matter enumerated in List-II is not finally settled by a decision that the legislation is in pith and substance one dealing with such matter

Federal Court Civil Appeals Nos. V to XI of 1944 by the Decree-holder.

Mr. P. C. Basu, Senior Advocate, Federal Court (Mr. Sris Chandra Dutt, Advocate, Federal Court, with him) instructed by *Mr. Ganpat Rai*, Agent for the Appellant.

Mr. S. M. Bose, Advocate General of Bengal (Mr. K. K. Basu, Advocate, Federal Court, with him) instructed by *Mr. B. Banerji*, Agent, intervened on behalf of the Province of Bengal for the Intervener.

The Respondents did not enter appearance.

The following judgment was delivered by

December, 12.

Spens, C. J. :—These appeals raise for decision a question which was left open in two previous judgments of this Court, *viz.*, the validity of debt relief legislation enacted by provincial legislatures, so far as such legislation affects claims on promissory notes. The question now arises under the Bengal Money-Lender's Act, 1940 (hereinafter referred to as the Act). Section 30 of the Act contains various provisions limiting the amount and rate of interest recoverable by a lender 'notwithstanding anything contained in any law for the time being in force, or in any agreement". Section 31 either prohibits or limits the award of post-decree interest. Section 36 empowers the Court to reopen transactions and accounts between the parties and also decrees and to release the borrower of all liability in excess of the limits specified in clauses (1) and (2) of section 30 and even to direct the lender to repay sums recovered in excess of the said limits. Under section 38, the borrower may himself make an application asking the Court to take accounts between him and the lender in accordance with the provisions of the Act and declaring the amount due on that basis. This provision seems to have been made with a view to facilitate a tender or deposit of the amount so declared due. (section 39). Section 2 (12) (*c*) makes it clear that the provisions of the Act were intended to apply even to loans advanced on the basis of promissory notes.

The appellant in all these cases is "The Bank of Commerce, Ltd., Khulna", an incorporated body, which by an order dated May 12, 1941, passed by the High Court at Calcutta under section 153-A of the Indian Companies Act, became entitled to the assets of another registered company known as The Khulna Loan

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Bank, Ltd. (which for some time was also known as The Khulna Loan Company, Ltd.). The proceedings out of which these appeals arise were in some instances initiated by the lender, by way of Small Cause suits, and in the other instances, by the debtors, by way of applications under section 38 of the Act. Though the proceedings commenced only during 194·, 1942 and 1943, they all related to promissoy notes which had been executed many years earlier in favour of The Khulna Loan Company or The Khulna Loan Bank. In all these proceedings, the debtors pleaded that the amount recoverable from them should be ascertained on the basis of the provisions contained in the Act. The creditor company insisted that it was entitled to recover the full amount due as per terms of the document, after giving credit for payments made towards interest or in part satisfaction of the debt. It was contended on its behalf that the Act was wholly *ultra vires* the provincial legislature or that so much at least of the Act as affected the rights of banks generally and the right of promissory note holders to recover the full amount due on their promissory notes was invalid. The Court of First Instance overruled this contention of the Bank and fixed the liability of the debtors on the basis of the provisions of the Act. The matter was carried on revision to the Calcutta High Court, but the Revision Petitions were dismissed. Hence these appeals

Before referring to the judgment of the High Court, it will be convenient to state what had happened when certain aspects of the present question were raised before this Court on the two previous occasions above-mentioned. The first case (*Subrahmanyan Chettiar* v. *Muttuswami Goundan* (1) arose under The Madras Agriculturists' Relief Act, 1938, which contained provisions resembling, in some measure, the provisions of the impugned Bengal Act. The Madras Act did not in terms refer to promissory notes but it defined "debt" in terms wide-enough to include debts due under promissory notes. The claim in that particular case, though it arose out of a promissory note, had passed into a claim under a decree, even before The Agriculturists' Relief Act was enacted. On this ground, this Court by a majority held that it was unnecessary to pronounce upon the validity of that Act so far as it affected promissory notes as such, Sulaiman J., who dissented, was of the opinion that no distinction could be made merely on the ground that a promissory

(1) [1940] F. C. R. 188; (1940) 73 C. L. J. 1.

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note claim had merged in a decree before the passing of that Act and he held that its provisions could not take effect as against such claims, whether they had already passed into decrees or still remained due as claims on promissory notes. Various aspects of the question were touched on in the course of the argument in that case and some of them were also discussed in the judgments. One point (relevant to the present case) was whether the offending provisions, if any, in that Act should be held to be void under section 100 of the Constitution Act or merely to be void to the extent of repugnancy with other laws, under section 107 of the Constitution Act. The Chief Justice did not discuss this question. Sulaiman J. went into it at some length and was of the opinion that the question should be decided by the application of the test of repugnancy. As there was some difficulty in bringing the case within the language of section 107 of the Constitution Act, the learned Judge held that the same result must be reached by the application of what has been described as the "Doctrine of Occupied Field" in cases decided under The British North America Act. The point was adverted to in the judgment of Varadachariar J. but no opinion was expressed.

The next occasion when this Court had to consider this question arose in *The Bank of Commerce, Ltd.* v. *Amulya Krishna Basu Roy* (1). That was also an appeal by the present appellant and the question arose in connection with the very enactment now under consideration, *viz.*, The Bengal Money-Lender's Act. There too, the appellant's claim, though arising out of a promissory note, had passed into a claim under a decree, before the Bengal Act was passed. The case was therefore governed by the decision of the majority in the Madras case. Certain grounds on which counsel for the appellant sought to distinguish the Madras case were examined and were held not to constitute grounds sufficient to lead to a different result. As a wide field was however covered by the argument, the judgment dealt with some of the points urged, without merely following the earlier decision. After observing that the Bengal Money-Lender's Act, taken as a whole, must be held to fall within the description "money-lending and money-lenders" (entry 27 in List II of the Seventh Schedule to the Constitution Act), this Court added "the fact that among the documents on which moneys may be lent promissory notes form an important class will not justify the view that

(1) [1944] F. C. R. 126.

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the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation". Referring to the judgment of Sulaiman J. in the Madras case, it was observed that even that line of argument would not support the plea of *ultra vires* but would only bring in the principle of repugnancy. In answer to the argument that the whole Act should be held to be *ultra vires* the provincial legislature, even if me alone among its provisions were invalid, it was stated that "where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned enactment". The observation that the test of repugnancy and not the rule of *ultra vires* was to be the governing principle was repeated in dealing with the argument that unlike the Madras Act, the Bengal Act was made applicable even to decrees that might be passed after 1940, in respect of promissory note claims.

It was in the light of the two judgments of this Court above referred to that the High Court at Calcutta dealt with the present batch of cases. The learned Judges quoted the observation in *Amulya Krishna Basu's Case* (2) that the Act, taken as a whole, fell within the description "money-lending and money-lenders" and was not wholly void as *ultra vires* the provincial legislature. They next pointed out that according to that judgment, it was the doctrine of repugnancy and not the doctrine of *ultra vires* that had to be applied in the determination of the case. Taking the cue from an observation of Gwyer C. J. in *Subrahmanyan Chetti's* case (1) they construed entry 28 in List I of the Seventh Schedule to the Constitution Act as limited to "legislation with respect to the negotiable aspect" of the instruments referred to in that entry and held that other aspects of such instruments though dealt with by the Negotiable Instruments Act, 1881, really pertained to the heads of "contract" and "evidence" which are subjects comprised in the Concurrent Legislative List. In this view, interest even when due under promissory notes was, in their opinion, a matter of contract, at any rate so long as the rights of holders in due course did not come into the picture. As the Act had received the assent of the Governor-General, the learned Judges held that

(1) [1940] F. C. R. 188; (1940) 73 C. L. J. 1.
(2) [1944] F. C. R. 126.

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its provisions were to this extent not only valid but, under section 107 (2) of the Constitution Act, also prevailed against the corresponding provisions of the Negotiable Instruments Act. This line of argument has since been followed and amplified by the Patna High Court in *Deo Nandan Prasad* v. *Ram Prasad* (1), though Meredith J. would have preferred to hold that the matter was governed by section 100 of the Constitution Act.

Before this Court, it was contended on behalf of the appellant that, on the true interpretation of section 100 of the Constitution Act, a provincial enactment even with respect to a matter enumerated in List II would be *ultra vires*, if and in so far as it affected any subject enumerated in List I and that the statement in *Amulya Krishna Basu's* case (2) that such instances should be judged only by the test of repugnancy should be reconsidered. As the relevant observations in the previous judgments were only *obiter*, we invited counsel to deal fully with all aspects of the question, unhampered by those observations. The decisions on the British North America Act and the principles of interpretation to be gathered from them have been referred to at some length in the previous judgments. It will be sufficient to state the result of their application here with due regard to the language of section 100 of the Constitution Act. We agree with the appellant's contention that the question of the validity of provincial legislation with respect to a matter enumerated in List II is not finally settled by a decision that the legislation is in pith and substance one dealing with such a matter. The opening words of sub-section (3) of that section—"Subject to the two preceding sub-sections"—import a further limitation on the provincial power, because sub-section (1) which is thus incorporated in sub-section (3) enacts that *notwithstanding anything contained* in sub-section (3), a provincial legislature shall not have power to make laws with respect to any of the matters enumerated in List I. This limitation was taken note of by Sulaiman J. in *Subrahmanyan Chettiar's* case (3). But he thought that the rigour of the literal interpretation of these words was "relaxed" by the use of the words "with respect to" in sub-section (1) and that accordingly a mere incidental encroachment on a List I subject was not forbidden to the provincial legislature, if its enactment was in pith and substance one relating to a List II matter. Where however even

(1) [1944] I. L. R. 23 Pat. 618.
(2) [1944] F. C. R. 126.
(3) [1940] F. C. R. 188 (217-218); (1940) 73 C. L. J. 1.

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such incidental encroachment conflicted with pre-existing central legislation, he held that the Doctrine of Occupied Field should be invoked and the central legislation allowed to prevail. The observations in *Amulya Krishna Basu's* case(1) followed this line of reasoning so far as it related to the effect of section 100; but they omitted to incorporate the limitation mentioned by Sulaiman J. that in such cases a provincial legislation can, if at all, encroach on List I subjects, only incidentally. The limitation is however implicit in the passage cited in that judgment from Section XIX of Lefroy's Treatise on Canadian Constitutional Law.

Counsel for the appellant contended that the incidental encroachment permitted to the provincial legislature under The British North America Act must be held to be a peculiarity of the Canadian Constitution and that even such encroachment on a List I subject by a provincial legislature in India would be a contravention of the absolute terms of prohibition employed in sub-section (1) of section 100 of the Constitution Act. We are unable to accede to this contention. The view that mere incidental encroachment would not amount to a transgression of the prohibition imposed on the provincial legislature by sub-section (1) is supported by the observations of Lord Atkin in *Gallaghar v. Lynn* (2). There, the Parliament of Northern Ireland was empowered to make laws for the peace, order and good government of Northern Ireland but it was not to make laws "in respect of trade" with any place out of Northern Ireland. One of its enactments known as the Milk Act was impeached on the ground that its provisions practically put an end to the trade in milk between customers resident within Northern Ireland and farmers resident outside the limits of Northern Ireland. The Judicial Committee held that the Milk Act was not a law "in respect of trade" but a law for the peace, order and good government of Northern Ireland; and it was said "if on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field." Towards the end of the judgment it was added, "though it may incidentally affect trade with county Donegal, it is not passed in respect of trade and it therefore is not subject to attack on that ground." In our judgment, a like interpretation should be placed on

(1) [1944] F. C. R. 126.
(2) [1937] A. C. 863 (869-870).

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the words " with respect to" in section 100 (1) of the Constitution Act.

The difference between the operation of the rule of *ultra vires* and the effect of the Doctrine of Occupied Field has been brought out in the recent judgment of the Judicial Committee in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). After noticing that in respect of the subjects specifically enumerated in section 91 of The British North America Act (as distinguished from the general words peace, order and good government), the Dominion legislature alone had *exclusive* legislative authority, their Lordships observed "it follows that legislation coming in pith and substance within one of the classes specially enumerated in section 91 is beyond the legislative competence of the provincial legislatures under section 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation or, to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament." It was next pointed out, "since 1894, it has been a settled proposition that if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in section 91 and is properly within one of the subjects enumerated in section 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation." If such is the position of provincial legislation under the British North America Act, provincial legislation in this country can stand on no better footing, in view of the language of sub-section (1) of section 100 which expressly denies power to the provincial legislature to make laws with respect to any of the matters enumerated in List I.

The observations of Viscount Maugham in the *Alberta* case (1) show that it would not be sufficient if the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List; their incidental character must be determined with reference to their relation to the subjects enumerated in List I. The decision of these appeals will therefore depend upon the determination of the question whether the provisions of the impugned Act encroach upon List I subjects to any substantial extent or whether the interference is only incidental in the sense above explained. As observed

(1) [1943] A. C. 356.

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in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), the question "whether a provincial Act which indirectly interferes, in some degree, with one of the powers of the Dominion is or is not *ultra vires* must be determined in each case as it arises".

It was contended on behalf of the appellant that The Bengal Money-Lender's Act interferes not merely incidentally but substantially with at least two of the matters enumerated in List I of the Seventh Schedule to the Constitution Act. By making sections 30, 36 and 38 applicable to claims under promissory notes, it was said that, the Act was an invasion of entry 28. It was also pointed out that by discriminating between "notified banks" and "other banks" (section 3) and imposing disabilities, penalties and restrictions of various kinds on "non-notified banks" the Act encroached on entry 38. In the view we take of the complaint of encroachment of entry 28, it is not necessary for the decision of these appeals to deal with the argument advanced with reference to entry 38. It was contended that the rules enacted in sections 32, 79 and 80 of the Negotiable Instruments Act were among the essentials of the law relating to promissory notes and that the provisions of sections 30, 36 and 38 of the impugned Act affect them so substantially that it would be impossible to regard them as merely amounting to an incidental encroachment on the law relating to promissory notes. This contention is in our judgment well founded.

The Advocate-General of Bengal could not deny that the encroachment, if any, was serious and substantial, but he contended that in view of the collocation of the several kinds of documents grouped together in entry 28, the scope of that entry must be limited in two ways—first, by assuming that it related only to negotiable instruments and secondly, as an inference from this limitation, that it related only to so much of the law as bore upon the negotiability of such instruments. On this assumption, he maintained that the impugned Act did not encroach on entry 28 of List I and he endeavoured to show that the Act had carefully refrained from touching the principle of negotiability or the consequent rights of holders in due course. Stressing the distinction between the indorsement of a note and the assignment of the *debt* evidenced by the note, the Advocate-General endeavoured to point out that the Act limited itself to a regulation of the rights

(1) [1939] A. C. 117 (129).

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of the assignees of the debt and never dealt with the rights of the indorsees of the note and particularly of the rights of holders in due course. He further contended that the rights as between the promisor and the promisee, including the right to interest, were only matters pertaining to the Law of Contracts and should not be held to be comprised in entry 28 of List I. We are unable to accede to this argument. The entry expressly refers to "cheques, bills of exchange and promissory notes" and then adds "and other like instruments." Whatever may be the result of construing these added words in the light of the *ejusdem generis* rule, we see no warrant for limiting the three specified categories of documents to instruments which are negotiable. Non negotiable promissory notes are known to the law and are recognised by the Negotiable Instruments Act. Some of the provisions of the Negotiable Instruments Act specifically refer to "negotiable instrument"; but other sections refer to "promissory note, bill of exchange or cheque" and there is no justification for limiting these latter provisions to only such documents as are negotiable. Even if it were possible to limit entry 28 to negotiable instruments, there is is no justification for importing the further limitation that this entry relates to only so much of the law as bears on the negotiability of such instruments and its consequences.

The Advocate-General drew our attention to certain observations in *Great West Saddlery Company* v. *The King* (1) and *John Deere Plow Company Ltd.* v. *Wharton* (2) and contended that they recognised the possibility of provincial legislation being valid and operative to a certain extent even as against companies incorporated under Dominion Laws. These observations must be understood in the light of the distinction recognised in the Canadian cases between the relation of section 92 of the British North America Act to the powers conferred upon the Dominion Parliament by the *general* words "peace, order and good government" of Canada in section 91 and the relation of the provincial legislature to the topics *exclusively* assigned to the Dominion Parliament by *specific enumeration* in section 91.

We may add that in the view that we take as to the scope of entry 28 in List I, the attack against the impugned provisions of the Bengal Act will not be met by treating them as legislation with respect to "contracts" (entry 10 of List III) because sub-section (2) of section 100 makes even legislation on List III matters "subject

(1) [1921] 2 A. C. 91.
(2) [1915] A. C. 330.

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to the preceding sub-section", whenever such legislation is enacted by a provincial legislature.

The appeals are allowed and the cases will be remitted to the High Court at Calcutta with a declaration that in place of the present decrees, revised decrees for amounts found due according to the terms of the promissory notes, after giving due credit for payments made, shall be substituted. The revised decrees will also provide for the costs of the appellant in the High Court and in the Court of First Instance.

The appellant is entitled to costs here. In view of the pettiness of the amounts involved in these cases and of the circumstances in which the appellant had to bring them to this Court, we consider that this is a fit case for directing payment of a sum in gross in lieu of taxed costs (Order XXXV, rule 5). We fix the total amount at Rs. 1,400 and dividing it equally between the seven cases, we direct the respondent (or respondents) in each case to pay Rs. 200 to the appellant for the costs of the appeal.

Leave to appeal to His Majesty in Council is granted.

A. T. M. *Appeals allowed.*

CRIMINAL REVISION.

Before Mr. Justice A. G. R. Henderson and Mr. Justice Mc. Sharpe.

GUNGA PROSAD GUPTA

v.

THE EMPEROR.*

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1944.

October, 25.

Defence of India Rules 1939, rule 81(4)—Bengal Essential Food Stuffs Anti-hoarding Order of 1944, clause 4—Indian Evidence Act (I of 1872), sections 32, 33—Admissibility of evidence—Section 24 of Indian Evidence Act, "person in authority", if includes the prosecutor.

Statement made to the prosecutor by a person without his being exa-

*Criminal Revision Case No. 625 of 1944, from a decision of the Additional Presidency Magistrate, Calcutta.

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mined as a witness is not admissible either under the provisions of section 32 or section 33 of the Evidence Act.

Once the complainant discloses that the statement of the accused was procured by him by inducement, it is the duty of the prosecution to show by re-examination or otherwise that the complainant was not a person in authority within the meaning of section 24 of the Evidence Act.

The words "person in authority" in section 24 of the Evidence Act include the prosecutor in the circumstances of the present case.

Ashutosh Dutt v. *King Emperor* (1) followed.

Application for Revision under sections 435 and 439 of the Code of Criminal Procedure by the Accused.

The material facts will appear from the judgment.

Messrs. D. N. Bhattacherjee and *J. C. Sinha* for the Petitioner.

Mr. Bireswar Chatterjee for the Crown.

The judgments of the Court were os follows :—

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Sharpe, J. :—The petitioner has been convicted under rule 81(4) of the Defence of India Rules of contravention of clause (4) of the Bengal Essential Food Stuffs Auti-hoarding Order of 1944, by having in his possession 5 maunds and 20 seers of sugar and sentenced to six months' rigorous imprisonment and a fine of Rs. 100, in default, two months' further rigorous imprisonment.

The prosecution case was that the complainant, who is described as a Supervisor, Post Raid Information Service, saw a hand cart on which were two bags and, being suspicious, he questioned the hand cart puller who told him that the bags contained sugar and, on being further asked as to where the sugar had been obtained, referred him to the petitioner. He then said that the petitioner being questioned admitted that the sugar was his and that he had brought it from a ration shop. It was further said that the petitioner produced a slip, Ex. 1, which had been altered to show a sale other than the sale for which it had been originally issued.

The defence was a denial of possession or ownership of the sugar or of making the statements alleged to have been made by the petitioner.

In coming to his finding that the sugar in question was found in possession of the petitioner the learned Additional

(1) (1921) 26 C. W. N. 54 ; A. I. R. [1921] Calc. 458.

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Presidency Magistrate relied mainly on two pieces of evidence: (1) the statement said to have been made by the petitioner to the complainant, the Supervisor, Post Raid Information Service and (2) certain statements said to have been made by the hand cart puller at the time of the seizure. On behalf of the petitioner, Mr. Bhattacharji, has contended that the evidence in regard to the statement of the petitioner was inadmissible by reason of the provisions of section 24 of the Evidence Act and that the statement said to have been made by the hand cart puller was not admissible in evidence since he was not examined as a witness.

On behalf of the Crown, Mr. Chatterji, has not seriously contended that the evidence in regard to the statement made by the hand cart puller was admissible and we are satisfied that this evidence could not be admitted either under the provisions of section 32 or 33 of the Evidence Act.

So far as the statements of the petitioner are concerned, Mr. Chatterji has contended that these were not statements made to a person in authority within the meaning of section 24 of the Evidence Act. The complainant stated in his cross-examination that he told the accused that if he told the truth he would let him go, otherwise he would take him to the police. By making this promise he undoubtedly gave the accused grounds which would lead him to suppose that he might gain some advantage by making the statement and, at that time, the complainant was certainly taking such action as was sufficient to lead the accused to suppose that he had the necessary authority for that action. We have no information as to the exact authority under which the Supervisor was acting or as to the precise duties which he was called upon to perform but we think that once he had disclosed that the statement of the accused was procured by inducement it was the duty of the prosecution to show by re-examination or otherwise that the complainant was not a person in authority within the meaning of section 24 of the Evidence Act. Apart from that consideration, we are in agreement with the decision in the case of *Ashutosh Dutt* v. *The King Emperor* (1), that in circumstances such as have been disclosed in the present case the words 'person in authority' in section 24 included the prosecutor. In the present case, it is clear that had it not been for the action of the Supervisor no prosecution would have been instituted against the accused petitioner at all. In this

(1) (1921) 26 C. W. N. 54; A. I. R. [1921] Cal. 458.

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view of the matter, we think that the evidence with regard to the statements by the accused which were elicited by the inducement offered by the Supervisor were inadmissible in evidence.

The position is therefore that there is on record no admissible evidence upon which a finding could be reached that the sugar in question was in possession of the petitioner. Whether the slip, Ex. 1, had been altered in order to support any bogus claim is a matter which is not under investigation in the present case, and since the statement of the accused is held to have been inadmissible, the slip by itself can form no basis for any finding with regard to possession.

We do not think that any useful purpose would be served by ordering a re-trial since in the absence of the hand cart puller there is really no evidence from which any finding as to possession can be reached.

The result is therefore that this Rule is made absolute. The conviction and sentence passed upon the petitioner are set aside. He will be discharged from his bail and the fine, if paid, will be refunded.

Henderson, J. :—I agree.

S. C. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice B. K. Mukherjea and Mr. Justice T. Ellis.

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EKBAL AHMED AND OTHERS
v.
DR. MAHAMMED MAQSOOD AND OTHERS.*

Provident Funds Act (XIX of 1925), section 5—Right of nominee to receive the money on death of subscriber—Nominee, if has preferential right over natural heirs—Question of title, if relevant in a proceeding for succession certificate.

A nominee of a subscriber of the Provident Fund has preferential right to receive the Provident Fund deposit over the natural heirs on the death of

*Appeal from Original Order No. 330 of 1941, against the order of G. B. Synge, Esq., District Judge, Darjeeling, in Succession Certificate Case No. 12 of 1940.

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the subscriber, in the absence of any rules of the Fund framed under section 3 (2) of the Provident Funds Act that the amount is payable to the dependent of the subscriber.

In a proceeding for succession certificate any question of title is irrelevant.

Application for Succession Certificate.

Appeal by the Applicants.

Messrs. Gopendra Nath Das, Sachindra Nath Das Gupta and *Kalyanmanila Mitra* for the Appellants.

Mr. Kumud Bandhu Bagchi for the Respondents.

The material facts will appear from the judgment.

The judgments of the Court were as follows :—

January, 17.

Mukherjea, J. :—The appellants before us are two minor sons of one Khalil Ahmed who was an employee of the Darjeeling Himalayan Railway and they applied through their maternal grandmother for succession certificate in respect of the provident fund money lying to the credit of the deceased in the Railway Provident Fund.

The application was opposed by one Maqsood who is a cousin of the deceased and his contention was that as Khalil Ahmed had during his life time appointed him his nominee with regard to the Provident Fund money, he was entitled to the same under section 5 (1) of the Indian Provident Funds Act (XIX of 1925), in preference to the natural heirs of the deceased.

The learned Judge accepted, though not without some hesitation, the contention of the opposite party, and dismissed the application for certificate. The applicants have come up on appeal to this Court.

It is not disputed that at the time when Khalil Ahmed started his provident fund account, he sent to the Secretary of the Fund the name of Maqsood as the person to whom he desired the money to be paid in the event of his death. At that time, apparently, no son was born to him, but the fact remains that the nomination was not varied or altered by any subsequent nomination.

We are not really concerned with any question of title in a proceeding for succession certificate, and the only point in controversy is as to whether the nominee can claim a preferential right in this matter over the natural heirs of the deceased.

Mr. Das appearing on behalf of the appellants relied on section 4 (1) (a) of the Indian Provident Funds Act read with sec-

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tion 3 (2) of the Act. Under section 4 (1) (a) of the Act, the dependent of the depositor or subscriber shall be paid the whole or portion of the provident fund money if it vests on any such dependent under section 3 of the Act. Section 3 (2) of the Act provides *inter alia* that any sums standing to the credit of any subscriber to or depositor in the provident fund at the time of his decease and payable under the rules of the Fund to any dependent of the subscriber or depositor.....shall vest in the dependent and shall be free from any debt or other liability incurred by the deceased or incurred by the dependent before the death of the subscriber or depositer.

It is clear that in order that the appellants might claim the benefit of section 3 (2) of the Indian Provident Funds Act it is necessary to show that under the Provident Fund Rules of the Darjeeling Himalayan Railway, the amount standing to the credit of the deceased in the Provident Fund is payable to the dependent of the subscriber. Admittedly, there are no such rules, and consequently it must be held that section 3 (2) of the Indian Provident Funds Act is of no assistance to the appellants.

On behalf of the respondent, reliance was placed on section 5(1) of the Indian Provident Funds Act. That subsection reads as follows :—

"Subject to the provisions of this Act, but otherwise notwithstanding any thing contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund or of any part thereof, any nomination, duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber or depositor by notice given in such manner and to such authority as is prescribed by those rules".

In the case before us, the depositor undoubtedly nominated the respondent as his nominee in accordance with the form prescribed by the rules of the Railway Administration, and the form purports to confer upon the nominee the right to receive the Provident Fund money standing to his credit at the time of his death. It seems, therefore, that as the present case does not come within section 3 (2) of the Indian Provident Funds Act,

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prima facie the nominee is entitled to preference over the dependent, and the decision of the Court below must be deemed to be right.

The appellants contended in the Court below as the nomination under the Provident Fund Rules was in the nature of a testamentary bequest, a Mahomedan was not entitled to leave to his nominee more than one-third of his assets. It was also argued that the Indian Provident Funds Act could not override the personal law of the parties. We should not express any opinion on this point. As has been said already, these are not matters which come really for decision in a proceeding for succession certificate. If the parties want to raise any question of title, they would be entitled to do that in a properly framed suit.

The result is that this appeal is dismissed.

We direct that the parties will bear their own costs in this Court and in the Lower Court.

Ellis, J.—I agree.

P. S.; A. K. D. G. *Appeal dismissed.*

Before Mr. Justice R. C. Mitter and Mr. Justice W. Mc. Sharpe.

JADU NATH RAY AND OTHERS

v.

KSHITISH CHANDRA ACHARJI CHOWDHURY AND ANOTHER*

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June, 5, 6, 29.

Bengal Money Lenders' Act (X B. C. of 1940) Sections 36(2) (c) and (e), 34(1) (a) (ii)—Re-opening of decree and passing of a new decree under Section 36(2)—Judgment-debtor restored to possession—Nature of such possession—Title to properties, if remains with the decree-holder—New preliminary decree, if necessary to be passed when all the mortgaged properties were sold—Whether a new preliminary decree is necessary where some of the properties sold—Personal decree, provision for, if and when can be made—Mesne profits—Decree-holder, if accountable for the period between the taking of possession and order for restoration—Liability for period after the order for restoration of possession during which judgment-debtor was kept out of possession.

*Appeal from Original Decree No. 218 of 1943, against the decree of 3rd Additional Court of Zilla 24 Parganas at Alipur, dated the 25th August, 1941 and 10th May, 1943.

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Where a judgment-debtor is restored to possession on the re-opening of a decree under section 36(2) (c) of the Bengal Money Lenders' Act he is to be in possession on his own account so that the judgment-debtor may have the means to re-pay the instalments payable under the new decree. The title to property would remain in the decree-holder inspite of the fact that the decree in execution of which he had purchased had been re-opened. The sale becomes void only on the last instalment being paid off.

Accordingly where all the mortgaged properties had been sold and purchased by the decree-holder a new preliminary mortgage decree to be followed on default of payment of instalment, by a new final mortgage decree for sale of the mortgaged preperties would be meaningless inasmuch as title to the properties would be with the decree-holder. In such a case there should be an instalment decree for the amount found due with insertion of consequences laid down in section 36(2) (e) of the Bengal Money Lenders' Act.

In case the judgment-debtor commits default and the amount then due under the new decree exceeds the price at which the properties were purchased, it would be unfair if the right of the mortgagee to get a personal decree for the balance that would remain after the set off of the price is not reserved.

If all the mortgaged properties had not been sold, there would be the necessity of passing a new preliminary decree for sale of the remaining unsold properties providing that in case of default in the payment of instalment by the judgment-debtor possession of those properties which had been purchased by the decree-holder would be restored to him and he will be able to apply for a new final decree for the unsold properties if the purchase price of the properties previously sold exceeds the balance under the new decree.

A decree-holder purchaser is not accountable to the judgment-debtor for mense profits from the date at which he had taken possession of the properties and the order for restoration made at the time of re-opening of the old decree. But the judgment-debtor would be entitled to get mesne profits from the decree-holder purchaser if he is kept out of possession inspite of order under clause (c) of section 36(2) of the Bengal Money Lenders' Act, although it may be by obtaining a stay order in the course of an appeal from the order re-opening the decree or from the new decree.

Appeal by the Decree-holder.

Application under Section 36 of the Bengal Money Lenders' Act.

The material facts will appear from the judgment.

Messrs. Atul Chandra Gupta and *Bankim Chandra Banerjee* for the Appellants.

Dr. N. C. Sen Gupta, Messrs. Jatindra Nath Lahiri, Bepin Chandra Basu, Surajit Chadra Lahiri and *Hemendra Nath Lahiri* for the Respondents.

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The judgments of the Court were as follows :

To secure two loans, one for Rs. 1,60,000/- and the other for Rs. 73,000/- the respondents executed in favour of the appellants' predecessors-in-interest two mortgages on 16th August 1918. Interest payable was at 8 per cent per annum with yearly rests.

On the 10th March 1926 a suit was filed to enforce both the mortgages. A preliminary mortgage decree for Rs. 4,21,851-1-6 was passed in April 1929 and the final mortgage decree in September of that year. In execution case No. 38 of 1930 all the mortgaged properties were sold in toto. They were purchased by the decree-holders for the total sum of Rs. 2,35,200/-. Those sales were duly confirmed, some in 1932 and the rest in 1935 and the decree-holders purchasers took delivery of possession of the different items of the property on different dates ranging from the 25th June 1933 to the 9th March 1936. On the 13th December 1937 they obtained a decree under Order XXXIV Rule 6 of the Code of Civil Procedure for the balance due to them, namely for Rs. 3,30,903/- ; that decree was put into execution and some of the personal properties of the mortgagors were sold. They were also purchased by the decree-holders on the 8th August 1939 for 3,899/-. The decree-holders took delivery of possession of those properties on the 6th July 1940. On the 9th December 1940 the defendants applied for re-opening the mortgage decrees as also the personal decree under section 36 of the Bengal Money Lenders' Act (X of 1940). By an order dated the 25th August 1941 the learned Subordinate Judge has re-opened all those decrees. He passed a new decree for a sum of Rs. 3,76,324-12-6 on the 10th May 1943. He has directed the payment of the said sum in fifteen equal annual instalments, the first instalment being made payable within "one year of the decision given by the highest tribunal" on the said application made by the mortgagors under section 36 of that Act and the succeeding instalments to be paid on the anniversary of the first *kist*. He directed restoration of possession of the properties purchased by the plaintiffs in execution of the re-opened decrees to the defendants. He also directed the defendants to file revenue *challans* and other receipts and vouchers showing discharge of all up to date liabilities on account of revenue and cesses along with the instalments as they fall due. In default of payment of any instalment or of submission of the revenue *challans* etc. "without reasonable cause" the plaintiffs were to get back possession of the property purchased by them and unpaid balance of the new decree to be set off against the

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amount at which the properties were purchased. The plaintiffs have filed this appeal against the new decree and the defendants have filed a memorandum of cross objections. None of the parties challenged correctness of the amount for which the new decree has been passed. In support of the appeal the following contentions have been put forward, namely,

(1) that the court below had no power under the Money Lenders' Act to reopen the preliminary and final mortgage decrees ;

(2) that the form of the new decree is bad. It ought to have taken the form of a preliminary mortgage decree and the learned Judge ought to have given the plaintiffs the rights to apply for a final mortgage decree if any default was committed by the mortgagor in the payment of instalments or in observing the other conditions. The right to obtain a personal decree ought also to have been reserved in favour of the mortgagees ;

(3) that the learned Subordinate Judge ought to have fixed definite dates for payment of the instalments, and

(4) that he should have made the other conditions definite and precise.

In support of the cross objections, the following points have been pressed :

(1) that the instalments ought to have been spread over a longer period ;

(2) that the lower court had no power to impose the conditions for due payment of revenue and cesses ; and

(3) that the learned Judge ought to have allowed the defendants mesne profits

(*a*) for the period beginning from the date when the plaintiffs took possession of the properties they had purchased at the court sales up to the date of the order when the court passed the order re-opening the decrees, and

(*b*) also for the period beginning from the last mentioned date till the date when the defendants would actually get back possession from the plaintiffs.

The learned Advocate for the defendants further contends that the amount of mesne profits for both those periods should be allowed to be set off against the first and succeeding instalments, that may be payable under the new decree.

The first point raised by the mortgagees is now concluded by the decision of the Full Bench in *Mritunjoy Mitter* v. *Satish Chandra Bannerjee* (1).

(1) (1944) 48 C. W. N. 361,

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The learned Subordinate Judge was right in reopening the preliminary and final mortgage decrees as well as the personal decree passed under Order 34 Rule 6 of the Code of Civil Procedure.

The second point raised by the plaintiffs and the second and third points raised by the defendants depend mainly upon the effect of section 36(2) of the Act. We will consider them together after the first point raised by the defendants.

The learned Subordinate Judge has found that Rs. 3,76,324-12-6 is payable to the plaintiffs. The correctness of that amount has not been challenged before us by the parties. He has made the sum payable in fifteen annual instalments. Each instalment comes to about Rs. 25088/-. The evidence is that the defendants have practically no property left to them and they can pay the instalments only out of the income of the properties purchased by the plaintiffs which are to be restored to them by reason of the provisions of the section 36(2) clause (c) of the Act. They are not in a position to say what the net annual income of those properties at present would be, for the plaintiffs have been in possession of the bulk of them from 1933 and of the rest at least from 1936. The plaintiffs were in a better position to prove what the net annual income would be but they have not chosen to give any evidence on the point, not even oral evidence. One of the defendants deposed and he said that they could repay the decretal amount in the course of thirty years. That evidence is vague and virtually amounts to an expression of opinion. In this state of the evidence it would have been necessary to remand the case to the lower court for further investigation as to what the net annual income of the properties purchased by the plaintiffs was, but the learned Advocate for the plaintiffs asked us not to remand the case as that course would delay payment to his clients. Ultimately the defendants' Advocate agreed to the view point of the plaintiffs' Advocate and both of them asked us to proceed on consideration based on experience.

In view of the general practice of money lenders in Bengal to keep as margin an amount almost equal to the value of the mortgaged properties when the loan is advanced on the security of zemindaries and other *Moffusil* properties, the value of the mortgaged properties at the time of the mortgage can be taken to have been about Rs. 5,00,000/-. The mortgage was in the year 1918 at that time it was usual to value zemindary properties

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at twenty times the net annual income. On that basis the net annual income would be about Rs. 25,000/- and in the absence of any evidence that the income has since then fluctuated that amount can be taken to be the net annual income now. The income of the properties purchased by the plaintiffs in execution of the decree made under Order 34 Rule 6 is negligible, for the price paid was only Rs. 3,899/-. Some allowance must be made for the fact that the whole amount of rent may not be collected every year from the tenants and for bad years, and some thing must be left to the defendants for their maintenance. Taking all these facts into consideration we think that the instalments should be spread over a period of twenty years.

The new decree passed in this suit is for the sum of Rs. 3,76,324-12-6. It has directed the defendants to pay the sum in instalments. It has also directed restoration of possession to them of the properties purchased by the plaintiffs in execution of the reopened decrees. Leaving aside for the present the conditions imposed on the defendants regarding the payment of revenue and cesses during the time that they would remain in possession, the decree provides that in default in the payment of any one instalment the plaintiffs would get back possession, and in that case the amount at which they had purchased the same in execution of the reopened decrees would be set off against the balance that would be due under the new decree. Having regard to the fact that the new decree is for the sum of Rs. 376,324/- odd and that the plaintiffs had purchased those properties for the sum of Rs. 2,39,098/- (being the total of the sum of Rs. 2,35,200/- for which the mortgaged properties had been purchased and of the sum of Rs. 3,898/- for which the other personal properties of the defendants had been purchased in execution of the reopened personal decree) there may be a balance due to plaintiffs after the set off but there is no reservation in new decrees by virtue of which the plaintiffs would be entitled to apply for a decree under Order 34 rule 6 Civil Procedure Code for receiving the balance of the new decree in case default be made by the defendants at a time when more than Rs. 2,39,098/- would be payable under the new decree. It is for this reason that Mr. Gupta attacks the form of the new decree. He says that the new decree has to be passed in the form provided for the section 34(1) (a) of the Act. His contention amounts to this, that where the suit is to enforce a mortgage the new decree must take the form of a preliminary mortgage decree with the result that the

right to apply for a final mortgage decree would flow from the provision of sub-clause (ii) of sub-section (1) (a) of Section 34. To support his contention he relies upon the words "in accordance with the provisions of the Act" used in clause (a) of sub-section (2) of section 36, which according to him attract all the provisions of section 34 to the new decree. He says that unless there be a new preliminary mortgage decree, there would be no final mortgage decree and it would be difficult for a mortgagee to get a balance decree under Order 34 Rule 6, for such a balance decree can only be passed if a balance remains due to the mortgage *after the mortgaged properties have been sold in execution of the final mortgage decree.* The sale held under the reopened final mortgage decree may not be held to be a sale in execution of a final mortgage decree on the ground that the final mortgage decree had been wiped out as a result of the proceedings under section 36 of the Act.

Whenever a decree is opened, be it a mortgage decree or a money decree, and a new decree is passed that new decree must conform with the express provisions of the different clauses of section 36 sub-section (2) which may be applicable to the case. Any provision in the other parts of the Act which would be in conflict with those express provisions must give way on the principle that special provisions would derogate from the general. If, however, there be no conflict, the special provisions would be considered to be in addition to the general ones. In the light of this principle the question raised before us must be examined.

The provision for instalments is made both in section 34 and and section 36 sub-section (2). In the case of a money decree a question may arise about the maximum number of instalments, for section 34 sub-section (1) clause (b) enjoins annual instalments not exceeding twenty in number whereas under clause (d) of section 36(2) the instalments need not be annual and may exceed twenty in number. But as that question does not arise before us we need not pursue the matter further. Where no sale had taken place in execution of the reopened decree, the new decree would not have to embody the terms to clauses (c) and (e) of section 36 (2) but when a sale has taken place in execution of the re-opened decree be it a mortgage decree, or a money decree and at the sale the decree-holder had purchased the judgment-debtor's property it would be incumbent on the court to pass the new decree embodying the terms of those clauses. A case

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may occur where only some of the mortgaged properties, but not all, have been sold in execution of the reopened mortgage decree. In such a case if the new decree were to contain only the provision of sub-section 2 of section 36 and nothing more there would be obvious injustice to the mortgagee. Justice requires a decree for sale of those unsold properties if the mortgagor makes default in the payment of instalments given by the new decree and the balance payable under the new decree exceeds the price for which those mortgage properties sold had been purchased by the mortgagee in execution of the reopened final mortgage decree. Similarly in the case where the mortgage decree had been reopened after sale of all the mortgage properties to the mortgagee in execution of the reopened mortgage decree and the balance of the new decree that remains due after the mortgagor had committed default in the payment of any instalment given by the new decree exceeds the price at which the mortgagee had purchased them in execution of the reopened decree, it would be unfair if the right of the mortgagee to get personal decree for the balance that would remain after the set off of the price is not reserved. It is to be seen if the provisions of section 36 or any other provision of the Act prevents the court from doing what justice requires. The last mentioned type is the case before us.

Order 34 Rule 6 of the Code of Civil Procedure proceeds on the basis that there has been or would be a sale in execution of the final mortgage decree. The point therefore depends upon the question whether the mortgagee can still be considered to have purchased the mortgage properties in execution of a final mortgage decree when that decree has been reopened and the mortgagee purchaser's possession is again restored to him under clause (e) of section 36(2) by reason of the default of the mortgagor in the payment of any instalment payable under the new decree. The question is not free from difficulty.

The general principle is that if a decree-holder purchases property in execution of a decree and that decree is either set aside or modified after the sale, his purchase falls through : *Zain-ul-Abdin Khan* v. *Asgar Ali Khan* (1). If this general principle be applicable the decree-holder purchaser's title would cease the moment the decree is reopened and a new decree passed under section 36 of the Bengal Money Lenders' Act. He would become a trespasser and would be liable to pay mesne profits to the

(1) (1887) L. R. 15 I. A. 12 ; I. L. R. 10 All. 166.

judgment-debtor at least from that date. If the judgment-debtor commits default in the payment of instalments payable under the new decree, the selfsame property would have to be sold again in execution of the new decree if the decree-holder wishes to realise his due from the same. Accordingly in the case of a suit to enforce a mortgage the new decree would have to be in the form of a preliminary decree for sale of the mortgaged property to be followed up by a final decree for sale. But clause (e) of section 36(2) provides for restoration of the properties purchased in execution of the reopened decree to the decree-holder purchaser, which means that he is not to put it up to sale again in execution of the new decree. From this it necessarily follows that the legislature intended to exclude the general principle formulated in *Zian-ul-Abdin Khan's* case(1). The title would remain in the decree-holder purchaser inspite of the fact that the decree in execution of which he had purchased had been reopened. The legislature has made it equally clear, that when the judgment-debtor is is restored to possession under clause (c) of section 36 (2) he is to be in possession on his own account, the intention of the legislature being to give the judgment-debtor the means to repay the instalments payable under the new decree. The rights conferred on the judgment-debtor under clause (c) of that sub-section is therefore of the nature of *jura in re alieno*, the title being still in the decree-holder purchaser but burdened with the enjoyment of the judgment-debtor as long as he pays the instalment payable under the new decree. When the new decree is fully paid up he becomes the owner, for the decree-holder purchaser would not be considered to be owner, for the debt due to him in consideration of which he had purchased the property had been discharged by payment. The consideration being extinguished the sale would be considered to have become void from the date of the payment of the last instalment payable under the new decree.

From what we have said above the following conclusions would follow :

(1) where all the mortgaged properties have been sold in execution of the reopened final mortgage decree and purchased by the decree-holder, a new preliminary mortgage decree followed on default of payment of instalment by a new final mortgage decree would be meaningless, for such decrees would have to be for sale of the mortgaged properties. In such a case there would

(1) (1887) L. R. 15 I. A. 12 ; I. L. R. 10 All. 166.

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be at the time nothing to sell, as the title to the mortgaged properties would not then be with the judgment-debtor but with the decree-holder himself by reason of his purchase in execution of the reopened final mortgage decree;

(ii) If all the mortgaged properties had not been sold in execution of the reopened final mortgage decree, there would be the necessity of passing a new preliminary decree for sale of the remaining unsold properties. The words of clause (a) of sub-section (2) of section 36, that the new decree is to be in accordance with the Act would not only allow but requires a preliminary mortgage decree to be passed. But that preliminary decree must be adapted to the circumstance of the case. It must provide for two things on default being made by the judgment-debtor in the payment of instalment payable under the new decree; namely (1) that possession of those properties which had been purchased by the decree-holder in execution of the reopened final mortgage decree is to be restored to him and the amount at which he had purchased the same to be set off against the balance of the new decree, and (2) that if after the set off there remains a sum still payable to the decree-holder, the latter will have the right to apply for a new final decree for the sale of those unsold mortgaged property in terms of section 34(1), clause (a)(ii).

(iii) That the decree-holder purchaser is not accountable to the judgment-debtor for mesne profits from the date at which he had taken possession of the properties purchased in execution of the reopened decree till the date when the order for restoration of those properties to the judgment-debtor is made at the time of the reopening of the old decree, and if the judgment-debtor commits default in the payment of any instalment payable under the new decree the decree-holder on getting back the properties from the judgment-debtor in terms of clause (e) of sub-section 2 of Section 36 would enjoy the same on the basis of the title he had acquired by his purchase in execution of the reopened decree.

The third and the fourth proposition would be equally applicable when the reopened decree is a simple money decree.

The third and the fourth proposition which we have laid down are supported by the decisions in *Tamluk Loan Office Co., Ltd.* v. *Ganga Narayan Kar* (1) and *Suresh Chandra Basak* v. *Kumada Sundari Pal* (2) respectively. As the decree-holder purchaser

(1) (1942) 46 C. W. N. 919.
(2) I. L. R. 1943, 1 Cal. 354.

would hold the properties restored to him on default in the payment of any instalment payable under the new decree on the title acquired in execution of the final mortgage decree (though re-opened), the words of Order 34, rule 6 would not stand in his way if he were to apply for a personal decree for the balance under Order 34, rule 6 of the Code of Civil Procedure, even by reason of the sale of all the mortgage properties in execution of the reopened decree the new decree has to take, and takes the form of a decree for a sum of money which simply directs payment of the decretal amount in instalments.

As the Bengal Money Lenders Act does not prevent the Court when passing a mortgage decree for the first time from imposing condition on the mortgagor with a view to preserve the mortgaged properties till the decree is satisfied by the payment of all the instalments, we do not see why the Court cannot impose such condition when passing the new decree.

We have held that the defendants are entitled to get an account of mesne profits from the plaintiffs from the date when the latter took order for possession of the properties purchased by them till the date of the restroration made in favour of the defendant under clause (c) of Sub-section (2) of section 36. But as a judgment debtor is to hold possession on his own account from that date, and so would be entitled to have the profits, he would be entitled to get mesne profits from the decree-holder purchaser if he be kept out of possession by the latter inspite of the order under clause (c) for restroration of possession. In the case before us the original decrees were reopened by the learned Subordinate Judge by his order dated the 25th August, 1941. As the new decree could only be passed after calculation, the learned Subordinate Judge made a direction in that order for taking accounts. On the 13th September, 1941 the defendants applied for restoration of possession. The Court fixed the 15th September, 1941 for hearing of that application. But on the 15th September, 1941 the plaintiffs informed the Court that they had filed an appeal to this Court against the order of the 25th August, 1941, and prayed for postponement of the hearing of the defendants' application for possession for a short time in order that they may move this Court for stay of further proceedings. That prayer was granted by the lower Court, and the hearing was postponed to the 11th November, 1941. On the 15th September, 1941, the plaintiffs filed their appeal in this Court against the said order of the learned Subordinate Judge dated the 25th August, 1941. That

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appeal was numbered First Miscellaneous Appeal No. 321 of 1941. On the same day they moved this Court and obtained a rule *nisi* for stay of further proceedings in the lower Court till the disposal of that appeal with *ad interim* stay. That rule was made absolute on the 8th December, 1941. On the 23rd March, 1943, the Miscellaneous Appeal was dismissed on the ground that no appeal lay from that order, as the proper procedure for the plaintiffs was to wait till the new decree was passed and then to file an appeal against the new decree. The new decree was prepared and signed by the Subordinate Judge on the 17th May, 1943. In it the order for restoration of possession was made. On the next day the plaintiffs applied to the Subordinate Judge for stay of delivery of possession. They filed this appeal in this Court against the new decree and obtained on order for stay of delivery of possession to the defendants till this appeal was disposed of. If these proceedings for stay had not been started by the plaintiffs the defendants would have got the order for restoration of possession on the 15th September, 1941, and could not have got back possession immediately thereafter. The plaintiffs are therefore liable to pay mesne profits to the defendants from the 15th September, 1941, till the defendants get back possession of the properties purchased by the plaintiffs in execution of the reopened decrees.

The third and the fourth points urged by the plaintiffs are sound. Definite dates for payments of instalments and for the performance of other conditions should be fixed.

A question was raised as to whether the plaintiffs are in law bound to hand over the collection and other papers to the defendants. They did not receive any papers from the defendants or their predecessors in interest and those papers the plaintiffs themselves had prepared for making collections. We are relieved of deciding that question as the parties have arrived at an agreement. The order which we are making regarding the papers is accordingly by consent of parties. The result is that both the appeal and the cross objections are allowed in part. The new decree would be as follows :—

The plaintiffs do put the defendants in possession of all the properties they had purchased in execution of the reopened decrees and render to them an account of mesne profits of those properties from the 15th September 1941, till the date when they restore or relinquish possession to or in favour of the defendants. The plaintiffs do deliver to the defendants the collec-

tion papers of those properties, which go by name of Touzis, *sehas* or *kirchas*, for the years 1347 to 1350 B. S. and up to the time when they restore or relinquish possession to or in favour of the defendants. It is declared that a sum of Rs. 3,76,324-12-6 is due to the plaintiffs by the defendants. The defendants do pay the said sum in twenty equal annual instalments, the first of such instalment to be paid on or before the first anniversary of the date on which the plaintiffs restore or relinquish possession of all the properties purchased by them in execution of the reopened decrees to or in favour of the defendants or of the date on which they deliver to the defendants, the aforesaid collection papers of the period as mentioned above, whichever date is later. And the defendants do pay to the plaintiffs the succeeding annual instalments on or before the same date of the succeeding years on which the first instalment become payable. And the defendants do pay the revenue of the aforesaid properties that would become payable after they are restored to possession, *kist* by *kist*, as they fall due at least three days before the *kist* dates and file the *challans* in the court below in proof of payment within ten days of the payments. And the defendants, do pay road, public works and education cesses and rent due to superior landlords as they fall due in respect of the aforesaid properties that would become payable from the date when possession is restored to them,—the cesses within the 31st March of each financial year and the rent within the month of chaitra of each Bengalee year and file in the Court below *chalans* and *Dakhilas* in proof of payment within fifteen days of the payments. In default of payment of any one instalment or in the payment of revenue, cess or rent within the time as aforesaid the plaintiffs would be entitled to get back possession of the aforesaid properties from the defendants, and in that event the sum of Rs. 239,099 at which the plaintiffs had purchased those properties would be set off against the balance of the amount then due to them under this decree. If thereafter any amount is still due to the plaintiffs under this decree the plaintiffs would be entitled to apply in the court below for a decree for the balance under Order 34. rule 6 of the Civil Procedure Code. And the court below do make an enquiry into mesne profits for the period aforesaid, that is, from the 15th September, 1941, till restoration of possession to the defendants. The defendants would be at liberty to set off the amount that may be decreed in their favour for mesne profits towards the instalment that would

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fall in the year in which the amount is declared by the court below and the next succeeding years till the said amount is wiped off. The plaintiff do also give inspection of and true copies to the defendants at the cost of defendants of such other papers relating to the aforesaid properties as they may require. The parties would bear respective costs in this appeal.

In the application Sm. Sindhubala Debi prays for being made a party to this appeal and for an order on the plaintiffs directing them to pay her a sum of Rs. 3744. The application is a misconceived one in view of the scope of the appeal before us. The application is dismissed but without costs. She may pursue her claim against the plaintiffs by taking such proceedings she may be advised to take.

No order is necessary on the application under section 115 of the Code of Civil Procedure.

A. K. D. G. ; S C. *Appeal partly allowed.*

Before Mr. Justice B. K. Mukherjea and Mr. Justice W. Mac. Sharpe.

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August, 3, 4 and 10.

SHILA PAL AND OTHERS
v.
THE COMILLA BANKING CORPORATION LIMITED.*

Sale in execution of decree—Adjournment without specification of hour—Such sale, if and when may be set aside in part—Civil Procedure Code (Act V of 1908) Order 21 rule 90.

It is incumbent upon the Court to specify both the day and hour under Order 21, rule 69 Civil Procedure Code. Failure to specify the same is a material irregularity.

It is a material irregularity to pass an order that the sale will be held after a Miscellaneous case started by the judgment-debtor is disposed of.

Surno Moyee v. *Dakhina* (1) followed.

*Appeal from Original Order No. 51 of 1942, against an order of the Subordinate Judge, 3rd Court Zillah Tippera at Comilla, dated the 28th November, 1940.

(1) (1896) I. L. R. 24 Calc. 291.

Order 21 rule 90 speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularity or fraud. A sale which is affected by such defects cannot be set aside in part, and it is immaterial that the person who applies to set it aside, is interested only in a fractional share of the property sold.

Ramesh Chandra v. *Birajasundari* (1) followed

Where properties are sold in execution of decree separately in separate lots, the sale of each lot is a separate sale and the sale may be upheld with regard to some of the lots and set aside as regards the rest under the provisions of Order 21 rule 90 of the Code of Civil Procedure.

Narasimhamurthy v. *Official Receiver, West Godavari* (2) followed.
Chhaterbijal Singh v. *Damodar* (3).

Appeal by some of the Judgment-debtors.

Application by some of the judgment-debtors under Order 21 rule 90 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Messrs. Jatindra Nath Sanyal, Amiya Kumar Shome and *Ranajit Acharjya Choudhury* for the Appellants.

Messrs. Atul Chandra Gupta and *Ajit Kumar Dutta* for the Respondents.

C. A. V.

August, 10.

The judgment of the Court was as follows :—

Mukherjea, J. :—This appeal is on behalf of some of the judgment-debtors, and it is directed against an order of the Sub-Judge, 3rd Court, Comilla, dated November 21st, 1941, dismissing an application made by the appellants, for setting aside an execution sale under Order 21, rule 90, Civil Procedure Code. The material facts lie within a short compass and may be stated as follows: The respondent Bank advanced a sum of Rs. 57,000 to Babu Saroda Sundar Pal, the father of the appellants on a promissory note, dated August 7th, 1933. On the borrower failing to pay the money, a suit was instituted by the Bank on the basis of the Promissory Note, in August, 1936. Pending the hearing of this suit, Saroda died and his six sons were brought on the record, as his heirs and successors in law. A decree was passed on September 29th, 1939, against these six sons, for a sum of Rs, 69,904 which was to be recovered from the assets of their late father in their hands. The decree was put into execution on September 29th, 1939, and 38 items of property, alleged to belong to Saroda

(1) (1927) 47 C. L. J. 351.
(2) (1935) I. L. R. 59 Mad. 438.
(3) (1932) I. L. R. 12 Pat. 181.

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Sundar, were attached by the decree-holder. The widow of Saroda preferred a claim which was allowed and a number of the attached properties were released from attachment. Eventually 15 items of property were put up to sale in separate lots on June 29th, 1940, and with exception of lot No. 35, all the rest were purchased by the decree-holder for an aggregate price of Rs. 5,975. On July 29th, 1940, the present proceeding was started by two out of the six sons of Saroda, who were judgment-debtors Nos. 3 and 6 and they prayed for setting aside the sale of 14 lots of properties on grounds of material irregularity and consequent inadequacy of price, under Order 21, rule 90, Civil Procedure Code. The Sub-Judge dismissed the application and the two judgment-debtors have come up on appeal to this Court.

The two questions that require consideration in this appeal are: (1) whether there was any material irregularity in publishing and conducting the sale? and (2) whether by reason of these irregularities, if any, the judgment-debtors sustained substantial injury. Mr. Sanyal appearing on behalf of the appellants has attempted to show that the material irregularities in connection with the sale of a three-fold character. In the first place there has been no proper publication of sale proclamation so far as the village properties are concerned. In the second place the prices of some of the properties have been grossly understated in the sale proclamation; and thirdly, no hour of sale was fixed by the Court on the adjourned date as is necessary under Order 21, rule 69, Civil Procedure Code. The entire evidence bearing on these points has been placed before us by the learned Advocates on both sides. It is conceded by Mr. Sanyal that there is no irregularity in the publication of the sale proclamation as regards lot No. (5) which is a plot of land measuring 1 *kani* and situated in the town of Comilla itself, nor with regard to lots Nos. 36 and 37, which are shares in certain joint stock companies held by Saroda Sundar Pal. Regarding the other eleven items of property which are situated in certain villages at a considerable distance from the Comilla town, it seems to us that the evidence of proclamation is unsatisfactory.

[After dealing with the evidence, his Lordship concluded as follows:]

In these circumstances, we are of opinion that there has not been proper publication of sale proclamation so far as the village properties are concerned.

It cannot be disputed that the price of some of the properties was grossly understated in the sale proclamation.

[After dealing with the contents of the sale proclamation, his Lordship concluded as follows:]

As the appellants inspite of having received notice under Order 21, rule 66, Civil Procedure Code did not attend at the drawing up of the sale proclamation nor preferred any objection to the same, the sale cannot be set aside on the ground of any defect in the sale proclamation.

The other irregularity complained of by the appellants is that in adjourning the date of sale from the 6th to 29th of June, 1941, the Court did not fix the hour at which the sale would be held on the 29th. The order was that the sale would be held, after a Miscellaneous case started by the judgment-debtor was disposed of. This is a material irregularity, for it is incumbent upon the Court to specify both the day and the hour under Order 21, rule 69, Civil Procedure Code [see *Surno Moyee* v. *Dakhina* (1)]. Moreover as there was no knowing as to when the Miscellaneous Cases would be disposed of, and whether or not it would be decided in favour of the decree-holder, there was a considerable amount of uncertainty involved in the order, which could not but adversely affect the intending bidders. It is admitted that no other bidder except the decree-holder was present at the time of the sale.

Let us now consider how far the judgment-debtors have suffered injury by reason of these irregularities.

[After dealing with the circumstances his Lordship concluded as follows:]

On the whole our conclusion is that the eleven items of village property were sold at an inadequate price resulting in substantial loss to the judgment-debtors, and as has been said already the sale of these properties was not properly advertised.

The question now is whether we should set aside the sale of all the fourteen lots, or of these eleven lots only. There is no evidence, as we have said above, to prove that the judgment-debtors suffered loss by sale of lots Nos. 5, 36 and 37. Now, Order 21, rule 90 speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularities or fraud. A sale which is affected by such defects cannot be set

(1) (1896) I. L. R. 24 Calc. 291.

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aside in part, and it is immaterial that the person who applies to set it aside, is interested only in a fractional share of the property sold. [*Ramesh Chandra* v. *Birajasundari* (1)]. When however properties are sold separately in separate lots, it must be held that the sale of each lot is a separate sale.

In such cases the sale may be upheld with regard to some of the lots and set aside as regards the rest. In the case of *Chhaterbijal Singh* v. *Damodar* (2), it was held by the Patna High Court that where properties are sold in several lots, the Court can set aside the sale in respect of some only of the lots, provided that the irregularity and the injury can be satisfactorily allotted to the sale of those lots only. Where however the irregularity extends to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shown to be inadequate. We cannot agree with this decision in its entirety. If sales of properties in separate lots are to be regarded as separate sales, it is immaterial, we think, that the irregularity extends to all the lots. If the sale of one particular lot has not resulted in any injury to the judgment-debtor to Order 21, Rule 90 Civil Procedure Code, even if there is material irregularity in relation to it. We think that the correct view has been taken by the Madras High Court in *Narasimhamurthy* v. *Official Receiver, West Godavari* (3) and as no injury has resulted to the judgment-debtors by sale of lots Nos. 5, 36 and 37, we hold that the sale of these lots would stand, even though there was a material irregularity with regard to them as well by nonmention of the hour of sale in the order of the Court dated June 6th, 1940. The result is that the appeal is allowed in part. The sale is set aside as regards lots Nos. 7, 8, 9, 10, 22, 24, 26, 27, 28, 33 and 38. Each party to bear his costs in this Court as well as in the Court below.

Sharpe, J. :—I agree.

P. S. *Appeal allowed in part.*

(1) (1927) 47 C. L. J. 351.
(2) 1932) I. L. R. 12 Pat. 181.
(3) (1935) I. L. R. 59 Mad. 438.

Before Mr. Justice C. C. Biswas.

ABDUL KARIM MASTER

v.

RAJ CHANDRA GHOSH AND OTHERS.*

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January, 30.

Ejectment—The Bengal Land Revenue Sales Act, 1868 (Act VII B. C. of 1868), Sections 12 exception 3, and 14—Note in the Remark Column of Cadastral Survey record—'Not binding on Government'—'Tenure created or recognised by settlement proceeding'—After effect of entry in Cadastral Survey record as to status of the person—'Current settlement'—'Tenure', if includes the interest of a jotedar or raiyat.

In 1898, defendant was recorded as an etmamdar. A note was added in the remark column of the Cadastral Survey record against this entry that this was not binding on Government. The settlement under cadastral survey was for the period ending in 1925. In the revisional survey of Chittgong held in 1930 he was recorded as a jotedar :

Held, that the meaning of the remark made in the cadastral survey record was that although the tenency was recorded as a tenure, it was not to be treated as a tenure created or recognised by the settlement proceedings. The note did not in any way weaken the effect of the entry that the interest was that of a tenure-holder.

The mere fact that the settlement was for the period up to 1925 would not make the cadastral survey record inadmissible in evidence on the question as to whether defendant's status as recorded therein continue to be such or not after that year.

An entry in mortgage deed executed in 1921 that the defendant was an etmamdar was good evidence as to his status for a subsequent period though the settlement under cadastral survey was for the period ending in 1925.

The 'current settlement' as mentioned in exception 3 to section 12 of The Bengal Land Revenue Sales Act, 1868, is in the present case the revisional settlement held in 1930 wherein the defendant was wrongly recorded as a jotedar.

Though the tenure as defined in section 1 of the Bengal Revenue Sales Act, 1868, includes "all interest in land", it does not include the interest of a jotedar or raiyat.

The interest referred to as "tenures" in the various exceptions under section 12 of The Bengal Land Revenue Sales Act, 1868, is distinct from 'raiyati' interests which are separately dealt with in section 14.

Appeal by Defendant No. 1.

*Appeal from Appellate Decree No. 1348 of 1939, against the decree of District Judge of Chittagong, dated the 28th April, 1938, affirming that of the primary Court.

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Abdul Karim Master
v.
Raj Ch. Ghosh.

January, 30.

Suit for ejectment by a purchaser at a revenue sale.

Mr. Rohini Benode Rakshit for the Appellant.

Mr. Nripendra Chandra Das for the Respondents.

The following judgment was delivered by

Biswas, J. : This is an appeal on behalf of defendant 1 in a suit which was instituted by the plaintiff for his ejectment on declaration of plaintiff's title. The plaintiff claimed to be the purchaser of a Noabad taluk at a revenue sale held on 8th January, 1937, and his case was that as such he was entitled to annul the interest of defendant 1 under section 12 of Act 7 of 1868 (B. C.). The defence was that defendant 1 was protected under section 14 of the Act inasmuch as he was a raiyat having a right of occupancy at a fixed rate, and in support of this plea, he relied upon the entry in the last revisional survey of Chittagong held in 1930 wherein he was recorded as a jotedar. Both the Courts below negatived this defence and decreed the plaintiff's suit. Hence the present appeal. The first point taken on behalf of the appellant is directed against the finding that the entry in the revisional khatian was wrong. It appears that in the previous cadastral survey which took place in 1898, defendant I was recorded as an etmamdar. A note was added in the remark column against this entry that this was not binding on Government. That, to my mind, only meant that although the tenancy was recorded as a tenure, it was not to be treated as a tenure created or recognised by the settlement proceedings. The note did not in any way weaken the effect of the entry that the interest was that of a tenure-holder. The learned Judge in the court of appeal below as well as the trial court held that this record, taken with the other evidence in the case, was sufficient to negative the entry in the R. S. Khatian. As regards the other evidence, reference was made by both courts to a mortgage deed in which defendant 1 himself had described his interest as that of an etmamdar. This mortgage deed was executed in 1921. Mr. Rakshit contends that as the settlement under cadastral survey was for the period ending in 1925, any entry made therein could not be regarded as good evidence as to the status of the defendant for a subsequent period. I am not prepared to accept that argument. The mere fact that that settlement was for the period up to 1925, would not, in my opinion, make the C. S. record inadmissible in evidence on the question as to whether defendant 1's status as recorded therein continue to be such or not after that year. The

mortgage deed 1921 would, in my judgment, be equally relevant evidence on the point. That being so, I think the courts below were justified in relying on these materials for the purpose of holding that the revisional survey khatian was incorrect. The first point urged on behalf of the appellant must consequently fail, and defendant 1 cannot, accordingly, claim protection under section 14 as an occupancy raiyat.

It is next urged that if defendant 1's interest is that of a tenure holder, he comes under the third exception of section 12 of Act 7 of 1868 (B. C.) and is entitled to exemption from eviction on that basis. This clause refers to "tenures created or recognised by the settlement proceedings of any current temporary settlement as tenures bearing a rent which is fixed for the period of such settlement." The difficulty in the appellant's way is that although the learned Judge has held that his interest is that of a tenure holder, the tenure cannot be regarded as a tenure recognised by the current settlement proceedings. The current settlement is the revisional settlement, and *ex hypothesi* the defendant is a recorded therein as a jotedar, though wrongly. It is difficult to see therefore how he can bring himself under clause (3). Mr. Rakshit refers to the definition of "tenure" in the Act, according to which it includes all interests in land. The argument is that the interest of a jotedar must therefore be held to be a tenure within the meaning of clause (3) of section 12. Reading the definition as a whole, I do not think that it can be given so wide a meaning. "Tenure" is no doubt said there to include "all interest in land", but although this expression is used, it will be observed that real object of the definition is to be found in the rest of the paragraph containing the definition, and it could not have been intended to include the interest of a jotedar or raiyat. At any rate, it seems to be fairly clear that the interest referred to as "tenures" in the various exceptions under section 12 are something distinct from raiyati interest which are separately dealt with in section 14. The interest which a purchaser is entitled to avoid under section 12 are all described as "under tenures," and exceptions in the section must obviously refer to interest of a similar character, and cannot therefore include the interest of the raiyats. In this view of the matter, I must hold that the second branch of Mr. Rakshit's argument is also untenable. The result is that this appeal fails, and is dismissed with costs.

A. T. M. *Appeal dismissed.*

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January, 5
February, 9,

Before Mr. Justice B. K. Mukherjea and Mr. Justice T. Ellis.

USHA PROVA DE

v.

SACHINDRA KUMAR BASU AND OTHERS.*

Arrears of putni rent—Sale of tenure under Putni Regulation (Reg. VIII of 1819)—Price fetched, insufficient to cover entire demand—Balance, if may be recovered by suit—Sections 8, 9 and Proviso to section 17 (3) of the Regulation—Contract providing for such recovery, if runs with the land and if consistent with the Regulations—Bar of execution under section 168A, Bengal Tenancy Act, (VIII of 1885) if good ground for refusing to pass decree.

There is no provision in the Putni Regulation itself expressly dealing with the situation which arises when the sale proceeds fall short of the demand.

Section 17 (3) of the Putni Regulation has got no application to such cases and as no fresh sale of the tenure can be held for realisation of the balance, the only remedy of the Zamindar must be to enforce his contractual rights against the tenant,

The words "in liquidation" in section 8 of the Putni Regulation do not mean that if the price fetched does not cover the entire demand, the Zamindar must forego the balance.

The words "in satisfaction of whose demand the sale may be held" in Section 9 of Putni Regulation do not imply that the demand must be deemed in law to have been wiped out and satisfied by the sale irrespective of the price that the sale fetched.

A stipulation in the putni engagement to the effect that "in case the sale does not yield a sufficient amount to make good the balance of rent, the remaining properties of the defaulter shall be further answerable for the demand" is, far from being inconsistent with the spirit of the Regulation, quite in conformity with it.

Whether section 168A of the Bengal Tenancy Act is a bar to the execution of a decree is a question to be decided if and when the decree is put into execution and cannot be a ground for refusing to pass a decree.

Appeal by Plaintiff.

Suit for money.

Dr. S. C. Basak and *Mr. Nalin Chandra Banerjee* for the Appellant.

Messrs. Atul Chandra Gupta and *Hemanta Kumar Bose* for Respondents Nos. 1 and 2.

Messrs. Gopendra Nath Das and *Jagadish Chandra Ghosh* for the Respondent No. 3.

*Appeal form Original Decree No. 216 of 1941, against the decree of T. C. Banerjee, Esq., Subordinate Judge of Zillah Jessore, dated the 16th May, 1941.

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The material facts will appear from the judgment.

C. A. V.

The judgment of the Court was as follows :—

Mukherjea, J.: This appeal is on behalf of the plaintiff landlord and it arises out of a suit to recover a sum of Rs. 7056-12-0 as the balance of rent due in respect of a Patni tenure which remained unsatisfied after the sale of the tenure under the provisions of Regulation VIII of 1819. The material facts are not in controversy and may be stated as follows :

The plaintiff is the present proprietor of a Zemindary property bearing Touzis Nos. 5074 and 5089 of the Jessore Collectorate. Under these Touzis there is a Patni created as early as in the year 1852 reserving an annual rental of Rs. 12000. The Patni changed hands on more occasions than one and the last purchase was by Nagendra Kumar Basu, whose legal representatives the present defendants are, and he purchased the tenure at a Regulation sale on the 15th of May, 1937. Nagendra Kumar Basu died in the year 1938 leaving behind him a Will by which his sons, the defendants in the suit, were appointed executors and the latter took out probate of the Will in due course. The Patni rent for the last six months of 1345 B. S. amounting to Rs. 7656-12-0 having been in arrears, the Patni was put up to sale under Regulation VIII of 1819 on the 15th of May, 1939, and it was purchased by the plaintiff Zemindar for a sum of Rs. 600 only. As the sale did not wipe out the entire demand, the present suit was filed by the plaintiff to recover the balance amounting to Rs. 7056-12-0.

The suit was contested by all the defendants and their defence *inter alia* was that section 168 A of the Bengal Tenancy Act was a bar to the suit and that the plaintiff's claim for the balance of demand after the sale was held under the Patni Regulation was not maintainable in law.

The learned Subordinate Judge came to the conclusion that the provisions of the Patni Regulation contemplate that the sale is to be held 'in liquidation' of the full demand and not of a part only and no suit is maintainable in law for recovery of the unrealised balance of a demand for which a Patni sale is held. He further held that even if a suit was maintainable, as a decree in such suit could not be executed in view of the provisions of section 168 A of the Bengal Tenancy Act, the Court should not pass an infructuous decree of such a character. The result was that the plaintiff's suit was dismissed. It is against this decree that the

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present appeal has been filed and Dr. Basak appearing on behalf of the appellant has challenged the propriety of the decision of the Court below on both the points mentioned above.

So far as the first point is concerned, the question for determination is whether the Patni Regulation expressly or by necessary implication forbids the institution of a suit for realisation of the balance of any demand for recovery of which a sale was held under the Regulation itself. Under section 8 of the Patni Regulation a Zemindar can present an application for the sale of a Patni for arrears of rent either on the 1st day of Baisakh or on the 1st day of Kartick of any Bengali year, and sales are held on the 1st day of Jaishta and 1st day of Aghrayan respectively in case the demand is not satisfied before these dates. In the application which is made in Baisakh the arrears of rent that can be demanded are those which accrued for the year just expired while in the mid-year sale the demand would include arrears for the last six months ending with the month of Aswin. Supposing, as in the case before us, the sale is held in the beginning of Jaishta and the price fetched at the sale does not cover the entire demand for which the sale was held, is the zemindar precluded from recovering the unrealised balance by a suit? In our opinion the answer must be in the negative. The Subordinate Judge in support of the view he took referred to certain expressions used in sections 8 and 9 of the Patni Regulation and relied very much on the proviso to clause (3) of section 17 of the same. Section 8, while speaking of the application for sale which is to be presented on the 1st day of Baisakh, lays down that the application is to be stuck up in some conspicuous part of Cutcherry with a notice that, if the amount claimed be not paid before the 1st of Jaishta following, the tenure of the defaulter will be sold on that day by public sale *in liquidation*. Undoubtedly the sale is to take place in liquidation or satisfaction of the demand, but that surely does not mean that if the price fetched does not cover the entire demand, the zemindar must forego the balance. Section 9 provides *inter alia* that at the sale every one, who is not the actual defaulter, shall be free to bid, not excepting the person in satisfaction of whose demand the sale may be held. In other words, it empowers the zemindar also to bid at the sale. It is rather surprising that the Subordinate Judge elicits from the words "in satisfaction of whose demand the sale may be held" an implication that the demand must be deemed in law to have been wiped out and satisfied by the sale irrespective of the price

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that the sale fetched. Mr. Gupta appearing on behalf of the respondent frankly stated that he cannot support this reasoning of the learned Judge. Mr. Gupta laid some stress on the proviso to clause (3) of section 17 of the Patni Regulation and it is necessary that we should examine this point carefully. Now section 17 lays down the manner in which the sale proceeds of a Patni are to be disposed of after a sale is held under the Regulation. The clause provides that one per cent of the sale proceeds is to be transferred to the account of the Government for the purpose of meeting the expenses of the establishment which the Government has got to maintain for carrying into effect the provisions of the Regulation. The third clause then lays down that the balance, on account of which the sale may have been made, shall next be made good in full to the zemindar or other persons to whom the same may be due. Upon this clause a proviso is engrafted which lays down that no former balances beyond those of the current year or of that immediately expired shall be included in the demand to be satisfied. Such antecedent balances, if the zemindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual Talukdar, and must be recovered in the same way as other debts by a regular suit in the court. This proviso only speaks of antecedent balances which are not and cannot be included in the demand, for which the sale was held. The zemindar cannot recover his unrealised antecedent balances either from the surplus sale proceeds or by a fresh process of summary sale directed against the tenure itself as the purchaser gets the property free of any existing rent charge. His remedy therefore is to sue the defaulter personally for this money. The proviso cannot have any bearing on the question that arises for determination in the present case and it does not say anything either one way or the other regarding the liability of the purchaser to pay the balance of the demand itself if the price fetched at the sale does not cover the amount. We cannot agree with Mr. Gupta that as nothing is said on this point, the implication is that the zemindar cannot realise the balance of the demand even as a personal debt from the defaulter. The entire section, as said already, lays down the way in which the sale proceeds of a Patni are to be disposed of. The proviso contemplates that there is a surplus left meeting the demand for which the tenure is put up to sale and it prevents the zemindar from realising his antecedent balances out of the surplus sale proceeds,

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which, as the subsequent clauses indicate, are to be preserved for the benefit of the Talukdars of the second degree and other persons who acquired valuable interests in the tenure sold. The utmost that can be said is that there is no provision in the Patni Regulation itself expressly dealing with the situation which arises when the sale proceeds fall short of the demand. Section 17(3) of the Patni Regulation obviously has got no application to such cases and as no fresh sale of the tenure can be held for realisation of the balance, the only remedy of the zemindar must be to enforce his contractual rights against the tenant. In our opinion, as these rights have not been in any way affected or taken away by the statute, they must be deemed to exist.

In the case before us we have got the Patni lease, dated the 14th of August, 1852, by which the Patni was created and it contains an express stipulation that in case of default of any payment of rent, the zemindar would have the right to put up the Taluk to sale for realisation of six-monthly or twelve-monthly arrears, as the case may be, and if the whole of the arrears are not realised by such sale, the balance would be recovered from other properties, movable or immovable belonging to the tenant. The Subordinate Judge says that such a covenant is inconsistent with the provisions of the Patni law and moreover it is not a covenant that runs with the land. In our opinion the learned Judge is wrong on both these points. The history and nature of Patni tenures are fully set out in the preamble to Regulation VIII of 1819 and in describing the essential incidents of such tenure, the preamble says that the terms of engagements interchanged between the parties generally provide that in case of an arrear occurring, the tenancy would be brought to sale by the zemindar and if the sale do not yield a sufficient amount to make good the balance of rent, the remaining properties of the defaulter shall be further answerable for the demand. Far from being inconsistent with the spirit of the Regulation, a stipulation like the one mentioned above is quite in conformity with it. It is further well established that a covenant relating to payment of rent occurring in a lease is not a mere personal covenant but binds the assignees of the lessee as well. We hold therefore differing from the learned Subordinate Judge that the plaintiff's suit is maintainable and is not barred under any of the provisions of the Patni Regulation.

On the second point raised in the suit the decision of the Subordinate Judge is equally unsustainable and Mr. Gupta has made

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no attempt to support it on that ground. Section 168A of the Bengal Tenancy Act might stand in the way of the decree holder executing a rent decree in a particular way, and whether this section is at all attracted to a particular case can only be decided when the decree is put into execution. It cannot be a ground for refusing to pass a decree that the decree, if passed, could not be executed in a particular manner. The result therefore is that the appeal is allowed and the judgment and decree of the Court below are set aside.

We are not unmindful of the fact that the Patni Taluk in this case was purchased by the defendants' father only two years before for a sum of Rs. 20,000 and the price it fetched at the Patni sale was undoubtedly very inadequate. It was open to the defendants, however, to take steps to have the sale set aside by depositing the amount due or by any other ways laid down by law. These questions of hardship are not material for our present purpose.

The result is that the plaintiff's suit is decreed in full. She will have the costs of the trial Court, there will be no order for costs in this appeal.

Ellis, J. :—I agree.

P. S. ; H. K. B. *Appeal allowed : Suit decreed.*

Before Mr. Justice R. C. Mitter and Mr. Justice W Mac. Sharpe.

DHAN BIBI

v.

MRINALINI GHOSHAL AND OTHERS.*

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June, 28, July, 3, 21.

Attachment before judgment—Claim under Order 38 rule 8, Civil Procedure Code (Act V of 1908) rejected—If Order 21 rule 63 applies—Suit to enforce claim—Limitation—If article 11 or 13 or 120 applies.

Order 21 rule 63 of the Civil Procedure Code applies when a claim to a property attached before judgment is either allowed or rejected. A suit

*Appeal from Appellate Order No. 75 of 1943, against the order of K. P. Piplai, Esq., Additional District Judge of Dacca, reversing that of A. K. Bhattacharya, Esq., Subordinate Judge, 5th Court, Dacca.

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should, therefore, be instituted for establishment of one's right to the property, when the claim to such property attached before judgment is rejected.

Raj Kishore Gope v *Bhabatosh Chakrabarty* (1) followed. *Prasada Nayadu* v. *Matipalli Virayya* (2); *Bisheshwar Das* v. *Ambica Prosada* (3) referred to. *Panchanan Bandopadhya* v. *Rabia Bibi* (4) distinguished.

The question of substance is within what time such a suit is to be brought.

Article 13 would not apply as that article does not apply where the order sought to be set aside had been made in a suit: *Shankar Sarup* v. *Mejo Mal* (5); *Official Receiver, South Malabar* v. *Veeraraghaban Pottar* (6) referred to.

Article 11 would not be inapplicable because the appellant's claim had been dismissed without investigation, if it is otherwise applicable.

Nagendra Lal Chaudhury v. *Faribhusan Das* (7) referred to.

Article 11, however, on a plain reading would not apply as an attachment before judgment is not an attachment in execution of a decree.

If article 11 is not applicable to the case of a claim to property attached before judgment then article 120 would apply with the result that a suit by the unsuccessful claimant or plaintiff would be in time if instituted within six years of the order.

Arunachalan Chetty v. *Periasami Servai* (8) and *Babbal Kumari* v. *Mulchand Marwari* (9) relied upon.

Changes in the Civil Procedure Code and the Limitation Act in respect of relevant provisions at different stages referred to and the case-law reviewed.

Appeal by Judgment-debtor.

Suit for recovery of a sum of money.

The material facts appear from the judgment.

Messrs. Sachindra Kumar Roy and *Satya Priya Ghosh* for the Appellants.

Mr. Bankim Chandra Banerjee for the Respondent.

C. A. V.

The judgment of the Court was as follows :—

July, 21.

In 1939 the respondent brought a suit to recover a sum of money from Khalil Ostagar and his son. She applied for attach-

(1) (1928) 49 C. L. J. 51.
(2) (1915) I. L. R. 41 Mad. 849.
(3) (1915) I. L. R 37 All. 575.
(4) (1890) I. L. R. 17 Calc. 711 F. B.
(5) (1901) L. R. 28 I. A. 203 (209); I. L. R. 23 All. 313 (323).
(6) (1921) I. L. R. 45 Mad. 70.
(7) (1918) 23 C. W. N. 375; I. L. R. 45 Calc. 785.
(8) (1921) I. L. R. 44 Mad. 908 F. B.
(9) (1934) A. I. R. Pat. 580.

ment before judgment of the property in suit and the property was attached in September, 1939. Khalil died in February 1940 and his widow, the present appellant was substituted as one of his legal representatives. Thereafter she preferred a claim under order 38 rule 8 Civil Procedure Code to the property that had been attached but that claim was summarily rejected on the 15th July, 1940. Subsequently a decree was passed in July 1940 against her as the legal representative of Khalil and against the other defendant. In January 1942, the respondent applied for execution of the decree. She prayed for the sale of the said property which had been attached before judgment.

As the decree could be executed only against the assets of Khalil in her possession, the appellant objected to the sale of the said property on the ground it was not Khalil's property but was hers. Both the courts below have come to the conclusion that the property belongs to the appellant. The Court of first instance allowed her objection and released the property from attachment but the lower appellate court has reversed that order on the ground that she should have brought a suit to set aside the adverse order passed in the claim case within one year of that order. As the finding of fact on the question of title is binding on us the principal question therefore in the appeal before us is whether Article 11 or 13 of the Limitation Act is applicable to a case where a claim to a property attached before judgment is made and rejected and before the decree is passed. If either of these Articles be not applicable the residuary Article namely Article 120, would be, and in that case the unsuccessful claimant would have six years' time from the date of the adverse order passed on her claim to sue for establishing her right to that property. A subsidiary question has been raised before us which involves a question of procedure, which is, whether the question relating to the title to the property can be raised on an objection by the appellant under section 47 of the Code of Civil Procedure or whether a suit is necessary.

The last mentioned point is not material except for the purpose of court-fee as her objection under section 47 has been filed in a Court which would have had jurisdiction to entertain a suit by her for establishment of her title to the property attached. We are, however, of opinion that a suit would be the proper remedy.

This Court has all along held that order 21 rule 63 of the Code applies when a claim to a property attached before judg-

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ment is either allowed or rejected [*Raj Kishore Gope* v. *Bhabatosh Chakravarty* (1)]. That is also the view of other High Courts: *Prasada Nayadu* v. *Matipalli Virayya* (2) ; *Bisheshwar Das* v. *Ambica Prosada* (3) ; *Babbal Kumari* v. *Mulchand Marwari* (4) ; *M. S. M. M. Firm* v. *Maung Sein* (5). The appellant therefore should have instituted a suit for establishment of her right to the property, as her claim to the property which had been attached before judgment had been rejected. This aspect of the case distinguishes it from the case of *Panchanan Bandopadhyay* v. *Rabia Bibi* (6), though she is the legal representative of Khalil Ostagar and is resisting execution on the ground that the property in question did not form part of the assets of the latter. The question of substance, however, is within what time she is to bring the suit. If the time had not run out on that date when she filed her objection under section 47 of the Code she would be able to raise the question that the property was hers and not the property of her husband, Khalil Ostagar, for in the circumstces of the case her application could have been converted by the execution Court to a plaint on payment of proper court-fees.

Article 13 of the Limitation Act would not in our judgment, apply. That Article does not apply where the order sought to set aside by a suit had been made in a suit: *Shankar Sarup* v. *Mejo Mal* (7) *Official Receiver, South Malabar* v. *Veeraraghaban Pottar* (8). The order rejecting the claim of the appellant was made in the suit which the respondent had filed against Khalil Ostagar. The competition, therefore, is between Article 11 and Article 120 of the Limitation Act.

The fact that the appellant's claim had been dismissed without investigation would not make Article 11 inapplicable, if it is otherwise applicable [*Nagendra Lal Chaudhury* v. *Fanibhusun Das* (9)]. The material portion of that Article is as follows:

"(Suit) by a person against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order:—(1) Order under the Code of Civil Procedure, 1908, (V of 1908) on a claim preferred to, or an objection made to the attachment of, *property attached in execution of a decree*.....one year (from) the date of the order".

(1) (1928) 49 C. L. J. 51.
(2) (1915) I. L. R. 41 Mad. 849.
(3) (1915) I. L. R. 37 All. 575.
(4) (1934) A. I. R. 1934 Pat. 580.
(5) (1931) I. L. R. 9 Rang, 561 (564).
(6) (1890) I. L. R. 17 Calc. 711 F. B.
(7) (1901) L. R. 28 I. A. 203 (209) ; I. L. R. 23 All. 313 (323).
(8) (1921) I. L. R. 45 Mad. 70.
(9) (1918) 23 C. W. N. 375 ; I. L. R. 45 Calc. 785.

As an attachment before judgment is not an attachment in execution of a decree, for the reasons that at the time when it is made there is no decree in existence, that Article would not on a plain reading apply where a suit is brought (and we have held that a suit will have to be instituted in the case before us) either by the plaintiff in the money suit or the claimant, where the claim to the property attached before judgment had either been allowed or disallowed, as the case may be, and as there is no other specific Article, Article 120 would apply to such a suit. We do not consider the decision under the repealed Code of Civil Procedure or under the repealed Limitation Acts of 1871 or 1877 to be material, for the language employed in Article 11 as it stands in the Limitation Act of 1908 is materially different from the language employed in the earlier statutes.

Section 81 of the Civil Procedure Code of 1859 (Act XIII of 1859) provided for attachment before judgment and section 86 provided that claims to property attached before judgment shall be investigated in the manner prescribed for investigation of claims to property attached in execution of a decree for money. Section 246 provided that if a claim is preferred to, or an objection offered against, the sale of property which may have been attached in execution of the decree or under an attachment before judgment, the claim or objection is to be investigated in a certain manner. The section itself provided that the order passed would not be applicable, but the party affected by the order would be at liberty to institute a suit to establish his right whithin a year of the order. The construction placed on section 86 was that the whole of section 246 was attracted to orders passed on claims preferred to attachments before judgment. These cases decided when section 246 of the Civil Procedure Code of 1859 stood in that form it would not be material as the provisions relating to limitation is not contained in order 21 rule 63 which, as we have already held, is attracted to attachments before judgment by reason of the provisions of order 38 rule 8, which in terms corresponded to section 86 of the Code of Civil Procedure of 1859. By the Limitation Act of 1871, the last twelve words of section 246 of the Civil Procedure Code of 1859 which provided for limitation was repealed, and Article 15 was introduced.

In 1877 both the Code of the Civil Procedure of 1859 and the Limitation Act of 1871 were repealed and new enactments were made in these places. The Civil Procedure Code (X of 1877) re-enacted in sections 485 and 487 the provisions of sec-

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tions 81 and 86 of the repealed Civil Procedure Code 1859 and sections 278 and 283 comprised in substance the provisions of section 246 of that Code as it stood after its amendment by the Limitation Act of 1871. In the Civil Procedure Code of 1882 (XIV of 1882) these sections were re-enacted under the same numbers. Section 283 was as follows :

"The party against whom an order under sections 280, 281 or 282 is passed may institute a suit to establish the right he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive".

Article 13 of the Limitation Act took the place of Article 15 of Limitation Act 1871, and was couched in the same language, but another Article 11 was added. The material portion of Article 11 as then framed was as follows :

"By a person against whom an order is passed under sections 280, 281, 282 or 283 ..... of the Code of Civil Procedure to establish his right to..... the property comprised in the order".

From the fact that sections 280 to 283 of the Code of Civil Procedure had been expressly mentioned in that Article two types of decisions were given : (1) that that Article was applicable only when the claim was investigated on the merits [*Uma Charan Chatterjee v. Hiran Moyee Dabi* (1)], and (2) that that Article was applicable to claims preferred to property attached before judgment. The decisions of the second type proceeded on the ground that orders made on such claims would be under section 283 of the Code. The last mentioned proposition had been laid down by Sir Barnes Peacock, C. J. as early a 1863 in *Kartick Chandra Mookherjee* v. *Mookta Ram Sarcar* (2) as a result of the construction of section 86 of the Code of Civil Procedure of 1859 which corresponded to section 487 of the Codes of 1877 and 1882. The language of article 11 of the Limitation Act of 1908 is different. The reference to the corresponding provisions of Code of Civil Procedure of 1908, namely to Order 21 rules 58 to 63 has been omitted and the words "attached in execution of a decree" have been added. That omission is not immaterial, for that omission has been given as one of the reasons for holding that Article 11 of the Limitation Act 1908 would apply to a suit even where the claim had been dismissed without investigation on

(1) (1914) 18 C. W. N. 779.
(2) (1868) 10 W. R. 21 C. R.

the merits but for default: *Nagendralal Chaudhury* v. *Fani Bhusion Dass* (1). As the omission has a material effect it cannot be said that the addition has none, and that Article should not in our opinion be held to be applicable to cases of attachments before judgment unless an attachment before judgment is by some provision of law or by some process of reasoning be held to amount to an attachment in execution. In the referring order in *Arunachalam Chetty* v. *Periasami Servai* (2) Napier J. was inclined to the view that Order 38 rule 11 operated to make an attachment before judgment an attachment in execution of the decree. We cannot agree with that view for all that order 38 rule 11 enacts is that it would not be necessary to attach the property again after a decree is passed and that decree is put into execution. Krishnan J. in the referring order relied upon rule 8 of order 38. He relied upon the Full Bench decision in *Prasada Nayladu* v. *Virraya* (3) which held that not only Order 21 rules 58 and 59 but also Order 21 rules 60 to 63 are made applicable to claims to property attached before judgment. No objection can be taken to his observation that "the effect of Order 38 rule 8 is to bring property attached before judgment within the purview of rules 58 to 63 Order 21," for that is the consistent view of this Court, but the further inference that he draws from that proposition and which is expressed in the next sentence "and thus within the *expression* property attached in execution of a decree" does not necessarily follow. Even if Order 21 rule 63 had been mentioned in Article 11 it would not make any difference in view of the words "attached in execution of decree". No doubt the object of an attachment before judgment and attachment in execution of a decree is the same namely to preserve the fund to which the decree-holder may look for satisfaction by taking away, so far as the decree-holder is concerned, from the defendant or judgment debtor the power to deal with the property. It is also no doubt desirable that the course of executions should be as speedy as possible and that the claims of third parties or of the decree-holder to the property attached either before judgment or after decree should be settled by a suit as quickly as possible, but we have to construe the statute as it stands. If there is a defect it would be for the legislature to remove it. If Article 11 is not applicable to this case

(1) (1918) I. L. R. 45 Calc. 785; 23 C. W. N. 375.

(2) (1921) I. L. R. 44 Mad. 908.

(3) (1918) I. L. R. 41 Mad. 849

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of a claim to property attached before judgment then Article 120 would apply with the result that a suit by the unsuccessful claimant or plaintiff would be in time if instituted within six years of the order, whereas if the claim be to property attached in execution the period of limitation would be one year only. There is that anomaly but that anomaly has to be removed by the legislature. As the claim to the property attached before judgment in the case before us was made and disposed of before the decree had been passed it is not necessary to consider the further point considered by the Full Bench of the Madras High Court in *Arunachalam Chetty's* case (1), especially as this Court in *Shibnath Singh Roy* v. *Sheikh Saberuddin Ahmed* (2), did not fully concur with the view expressed therein. We agree with the observation of that Full Bench which, whilst not expressed in specific terms, amounts to an expression of the view that Article 120 and not Article 11 of the Limitation Act applies to a suit brought by an unsuccessful claimant, whose claim to property attached before judgment had been preferred and rejected before the decree had been passed. This view is supported by the decision of the Patna High Court in *Babbal Kumari* v. *Mulchand Marwari* (3). We decide the question accordingly.

As we have held that the appellant's remedy lay in a suit the appellant must pay the deficit court fees on her objection petition filed in the Court of first instance under section 47 of the Code and on the memorandum of appeal filed in this Court. The court-fees would be calculated in terms of Schedule II Article 17 clause (i) of the Court-Fee Act. We give her time till the 30th August, 1944 to put in this Court the deficit court-fees. If she pays the deficit court-fees within the said time the appeal will be allowed with costs throughout in her favour, hearing fees in this Court being assessed at two gold mohurs, and, the execution against the property in question dismissed. In default the memorandum of appeal to this Court and her objection petition in the Court of first instance will be rejected.

P. S.; A. K. D. G. *Appeal allowed.*

(1) (1921) I. L. R. 44 Mad. 908 F. B.
(2) (1928) I. L. R. 56 Calc. 416.
(3) (1934) A. I. R. Pat. 580.

Before Mr. Justice N. G. A. Edgley and Mr. Justice T. J. Y. Roxburgh.

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February, 23, 24, 25. March, 21.

Defence of India Act—Violating rules framed under—Contravening freezing order—Goods wrongfully disposed of—Charge against partner of the firm—Act likely to mislead in the discharge of lawful function—Defence of India Rules, rule 75A (7)—'Disposal', meaning of—Property in goods—Act of disposal—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), Section 236—Proceedings, if void for misjoinder—Evidence showing different offence—Contravention of order under rule 75A taking place in 1941 and prosecution started in September, 1942—Provision for punishment for breach—Order issued under rule 83 (3a) then in force—Punishable under sub-rule (4)—Order under rule 83 (3a), if can be issued on a firm—Defence of India Rules, rule 119—Statutory offence—Proof of guilt—Ultra vires.

The word 'disposal' in rule 75A (7) of the Defence of India Rules does not mean any actual removal or delivery by actual movement of the goods.

The question whether property in the goods pass by handing over of the delivery order or not depends for its solution on the intention of the parties, as to whether the property was to pass before payment of money or not. Even assuming that the intention was that the property in the goods should pass with the delivery order, the subsequent acceptance of money by the vendor is another act of disposal, as would also have been actual delivery of the goods by him if he had allowed the purchaser to remove the goods.

If the prosecution case was that the accused misled the authorities by making a promise, which he never meant to keep, in order to get out of the difficulty created by a contravention of the freezing order having been made, then there was a misjoinder of charges. The latter offence was entirely separate from the former, though arising out of it.

It is quite legitimate for the prosecution under section 236 of the Code of Criminal Procedure to charge the accused in the alternative either that they had delivered the goods, that is to say disposed of them in contravention of the order or had falsely informed the authorities that they had done so.

The fact that in argument at a late stage the prosecution sought to meet a defence argument by contending that the evidence proved a different charge in no sense alternative to the charge under rule 75A of the India

*Government Criminal Appeal No. 5 of 1943, against an order of the Chief Presidency Magistrate, Calcutta.

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Defence Rules cannot make the proceedings void on the ground of misjoinder.

Though the contravention took place in December, 1941 and the prosecution was started in September, 1942, the accused will be punishable under the rules as stood in December, 1941. Hence when the accused was tried for a contravention in December, 1941 of an order made under rule 83 (3a) then in force, he would be punishable under rule 83 (3a) as then stood.

An order under rule 83 (3a) can be issued on a firm not being an entity but a partnership registered under the Indian Partnership Act, the firm means the partners collectively.

Rule 119 of the Defence of India Rules relates to the service of notice. The provision in respect of a firm and company is for publication to them as a 'class of persons'. Rule 119 as it stood in December, 1941, provided a method for informing a firm of an order affecting it.

The Common Law doctrine as to the person who is to prove innocence, has no application to statutory offences of the type created by rule 5 of the Defence of India Rules as originaly framed read with other rules.

As regards the Defence of India Act, the principle of *Queen* v. *Burah* (1) and the later cases applies. Section 102 of the Government of India Act so far from showing any intention to restrict the legislative power for the emergency of war deliberately widens them.

Defence of India Act is *intra vires* the Central Legislature: *King-Emperor* v. *Benoari Lall Sarma* (2) followed.

Appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal against acquittal order.

The facts appear sufficiently from the judgment.

Messrs. S. M. Bose (Advocate-General of Bengal), Anil Chandra Roy Choudhury, Susil Chandra Sen and *G. K. Mitter* for the Appellant.

Messrs. S. N. Banerji, B. C. Ghose, Satindra Nath Mukherjee, S. B. Sinha, K. K. Bose and *Samarendra Nath Mukherjee* for the Accused Respondents.

C. A. V.

The following judgments were delivered :

March, 21.

Roxburgh J. :—This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against an order of the Chief Presidency Magistrate, Calcutta, acquitting two persons D. B. Futnani and A. V. Joshi of offences under rules 75A (7) and 46(3) of the Defence of India Rules.

The prosecution case is that D. B. Futnani is a partner of the

(1) (1878) L. R. 5 I. A. 178 : 3 App. Cas. 889 ; I. L. R. 4 Calc. 172.
(2) (1943) 47 C. W. N. (F. R.) 41.

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firm of Murlimal Santram & Co., having its Head Office at Lachmidass Street, Karachi, and A. V. Joshi is the Calcutta Manager or representative of the Firm, having his office at 20 Maharshi Debendra Road, Calcutta. Application for a licence to import 25 tons of barbed wire from America was made by the Firm in Karachi to the Steel Controller, Calcutta, by Ex. 1, signed in the firm name, the writing having been proved by the handwriting expert (P. W. 2) to be the hand of Futnani. Import licence No. 4216 was duly issued by the Deputy Steel Controller on the 3rd November, and was received by Major Thomas (P. W. 7), Deputy Controller of Purchase, along with the application. With a view to requisitioning the goods he forwarded these papers to the Controller of Supplies by his letter Ex. 2, dated 5th November, asking him to issue the licence and at the same time to take action to freeze the stock. On receipt of this letter Ram Krishna Das (P. W. 1) senior clerk of the office of the Controller of Supplies telephoned to the Calcutta Office of the Firm; and about the 10th November, Joshi came and interviewed Mr. Shefta, Assistant Controller of Supplies, saying he knew nothing about the matter and could not give the particulars asked for. On the 12th November, the Controller of Supplies, Bengal Circle, wrote to the Calcutta branch a letter (Ex. 4) asking for certain particulars adding that the licence would only be issued on the particulars being furnished. On the 14th November Joshi replied by Ex. 5. signing his own name 'per pro' the firm, saying, that he knew nothing about the matter and that the original letter of the Controller had been directed to the Karachi Head Office for early compliance. The particulars were duly supplied in a letter (Ex. 6) dated the 21st November, from the Karachi Head Office, signed in the name of the firm, in Futnani's handwriting. There was a request that all enquiries of the nature should be referred to Karachi. On the 21st November Joshi wrote a letter (Ex. 7) asking that the licence might be granted. On the 24th November the licence was forwarded to Joshi with the letter Ex. 10, issued by the Controller of Supplies, which contained a equest that after the goods had been cleared, all the documents, invoice, Customs receipt for import etc. should be brought to the office of the Controller. The letter was received and acknowledged by Joshi on the 25th November (Ex. 10/1). On the same day a freezing order, signed by Col. Marriott, Controller of Supplies, issued under rule 83(3a) of the Defence of India Rules dated rthe 22nd November, and relating to the consignment of 25 tons

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was served. The original order Ex. 8/1 was subsequently seized by the police from Joshi's office, and he acknowledged receipt of it by Ex. 9. The order was addressed to Murlimal Santram & Co. 20 Maharshi Debendra Road, Darmahatta, Calcutta"; it demanded information as to the stock received by S. S. Frederick Lukes, and directed "that you or your agent, shall not, except with my permission or under my directions, dispose of the said articles till the expiry of thirty days from the date of this order."

On the 27th November Joshi furnished the information required in the freezing order, adding "We are expecting these goods shortly in our godown, and as soon as they come in our godown, we shall not part with them till the time specified by you in your aforesaid order".

On the same day he acknowledged by his letter Ex. 12 the receipt of the import licence, agreed to show the documents as requested in the letter Ex. 10 of the 24th November, and added "When the goods arrive in our godown, they will be kept reserved for you till we hear further from you". Delivery of the goods was taken by the firm on the 28th November, and they were stored in a godown hired from the Port Commissioners at Sahib Bazar.

On the 8th December Joshi came to the office of the Controller of Supplies and interviewed Mr. Shefta; at that time he said he could not give the information required by the Controller's letter of the 24th November (Ex. 10) A reminder, mentioning the interview, was sent to him on the 12th December (Ex. 13). In reply to this he wrote the letter Ex. 14, dated 13th December, stating that a telegram had been received from his head office informing him that one of the partners was starting on Sunday the 14th December for Calcutta, that he would handle the matter personally and satisfy the Controller with all the information called for in the letter of the 24th November.

As the period of the first order was about to expire a second freezing order was issued on the 20th December (Ex. 16) for a further period of 30 days. This was received and acknowledged by Joshi (Ex. 16/1).

On or about the 29th December, the two accused came to the office of the Controller of Supplies and handing the letter Ex. 18, they interviewed Mr. Shefta in the presence of the clerk P. W. 1.

Futnani stated the facts as set out in the letter in the presence of Joshi. About the same time Futnani interviewed Col. Fowler, Chief Controller of Purchase in the presence of Major Thomas (P. W. 7,), and stated the facts substantially as they appear in the letter Ex. 18. The purport of this letter was that as the freezing order was about to expire, and there had been no requisition, Joshi had wrongly believed that the goods were not required by Government, and as he stood in urgent need of money and there was panic prevailing in the market at the time, and as telegraphic communication between Calcutta and Karachi was not normal "our this representative here, in order to raise money to meet his at-hand financial engagements, delivered away this small quantity of 25 tons to the party to whom these were sold by our Head Office in Karachi as long ago as 29th July 1940." Later on "No doubt this is an act we highly deprecate but this having been done in the circumstances, explained to save our existence here, we cannot do more than to warn our representative here to be more careful in future," The letter also contained an offer to supply the goods by purchasing them from the local market where they were said to be available in abundance, and to bill for them at the price paid without claiming any profit whatsoever. On the 31st December Joshi wrote to the Controller of Supplies to confirm the interview Futnani had with Col. Marriet and Col. Fowler, and stating that Futnani had instructed him to purchase the goods from the local market, and to furnish the bill to the Controller, leaving it to him solely to pay the price considered fair, adding "should we not be able to pick up the material from market, we shall carry out your order and meet our liability by buying the goods from other markets, or from the person we had delivered to, and thus deliver the full quantity of 25 tons". This was acknowledged by the Controller of Supplies' letter dated 20th January (Ex. 20) wherein he stated "Without prejudice to my rights to proceed against the firm for violating the requisition (sic) duly made under the Rules framed under the Defence of India Act and to recover the loss caused thereby, I confirm that I have given you liberty to supply the goods which were disposed of wrongfully by you by buying the same from the local market or elsewhere, leaving the question of the price to be paid in respect thereof to me solely according to my discretion on a consideration of all the facts and circumstances—it being understood that the entire quantity of the goods requisitioned will have to be supplied by such pur-

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chase whether from the local market or elsewhere and within a reasonable time not exceeding one month from the date hereof". A reminder to this was sent on the 29th January (Ex. 21). Futnani replied, signing the name of the Firm by Ex. 22 on the 3rd February, resiling from the previous arrangement agreeing to supply the goods only on payment of the firm's cost price, plus a reasonable percentage as remuneration. Thereafter the present case was started, the goods in question were eventually requisitioned, after they had been found on the 16th September 1942 in the Port Commissioner's godown in Sahib Bazar where they had remained all along.

On the above facts a charge was framed against Joshi as Manager of the firm for having between the 22nd November, 1941, and the 8th January, 1942, contravened the orders Ex. 8 and Ex. 16 namely the freezing orders of the 22nd November, and the 20th December. Futnani was charged as partner of the Firm in the alternative with having contravened the orders, or with having abetted the contravention. Futnani was also charged with having between the 20th December, 31st December made a statement in Ex. 18 having reasonable cause to believe that the act or statement was likely to mislead Major Thomas in the discharge of his lawful functions in connection with the Defence of British India or for securing the public safety, and thereby having committed an offence punishable under rule 46(3) read with rule 46(d) of the Defence of India Rules.

Joshi when examined under section 342 of the Code of Criminal Procedure stated that in the third week of December his firm was very hard up for cash. A man of the firm of Dewan Chand Nikamal came with a delivery order issued by the Head Office regarding the 25 tons of barbed wire, and he accepted half the price from him on account and showed him the goods. The man agreed to pay the balance and take delivery, but the goods were never actually delivered. The man came on the afternoon of 20th December, before Joshi received the second freezing order (Ex. 16). Though he knew the first order had not expired he took the money thinking that if the freezing order was renewed he would not give actual delivery.

Futnani stated that the delivery order had been issued in Karachi without his knowledge, and during his absence; Joshi told him about having accepted the money. He then told Col. Marriot about what had happened, and that he was prepared to make over 250 tons without profit. In a written statement, he

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alleged he had nothing to do with the sale of the 25 tons, except the correspondence that took place in Calcutta in December, 1941, he left Karachi on the 13th December and arrived in Calcutta on the 27th December, when Joshi showed him the two freezing orders, and told him about the issue of a delivery order by the Karachi office. Futnani told Joshi he had acted wrongly and should have consulted the Karachi office either by telegraph or telephone, but Joshi replied that owing to the war situation he could not get into communication. As a straightforward man he (Futnani) then went and explained the whole situation to Col. Marriott. The rest of his written statement is taken up with an attempt to put a good face on his attempts to get out of the arrangement made with authorities, and does not much concern us here.

In argument before us some reliance is placed by the defence on some documents filed compendiously as Ex. 57, being correspondence and copies of correspondence between Murlimal Santram & Co. in Karachi and Dewanchand Nikamal. The correspondence goes to show that there was an agreement for sale of 100 tons of barbed wire of American manufacture on 30th July, 1941, by the former firm to the latter, and that on the 20th December, 1941, a delivery order for 25 tons lying arrived at Calcutta was made over at Karachi to the buyers, who were to 'instruct your friends in Calcutta by telephone to pay for and take delivery of the goods from our Calcutta friends'. This was issued on the same day that Joshi says Diwanchand's man came and paid half the money in Calcutta. On 31st December Murlimal Santram & Co. wrote to Dewanchand Nikamal saying that it was not possible for the Calcutta branch to have the goods released and delivered there in fulfilment of the delivery order issued to them, "though they have explained to the Government that our contract with you is positive delivery contract and not a shipment contract and that virtual delivery of the goods has already been given to you by our issuing to you the delivery order for the goods. Lest there may arise any difficulties later on with the Government, we have telephoned our friends in Calcutta to stop delivery of the goods delivered to you technically by issue of the delivery order. Please return us the delivery order".

The learned Chief Presidency Magistrate acquitted the accused on the following grounds :

(1) So far as the order of 22nd November required informa-

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tion, this was supplied by Ex. 11. (This is in fact correct and no argument was adduced before us on this point)

(2) The prosecution have not established that the goods were disposed of by the accused. The accused could have saved a great deal of trouble if from the beginning they had told the truth that, although there had been a sale or partial sale to Dewanchand Nikamal, the goods all along remained in the custody of the accused's firm. They decided for reasons best known to themselves not to tell the truth in this respect. Although Futnani in Ex. 18 had stated that the goods were "delivered away", there was no actual delivery.

These two grounds cover the charges under rule 75A, and the alternative abetment charge.

(3) At first the prosecution case on the charge under rule 46(d) appeared to be that the accused Futnani misled Major Thomas by saying the goods had been delivered away, when they were still in his custody. The case was so urged until counsel for the accused had addressed the court; but after that it was contended that the accused had misled Major Thomas by promising to purchase the goods in the local market, without intending to keep the promise. In any case the charge failed (i) because it had not been proved that Major Thomas had any functions whatever in connection with the defence of British India or the securing of the public safety, (ii) because the representations were not made to Major Thomas, but to Col. Fowler and (iii) the letter Ex. 18 was issued to the Controller of Supplies, not to the Controller of Purchase, and the freezing orders were, issued by the former.

(4) There has been a misjoinder of charges; the accusation that the accused had disposed of the goods is entirely separate from and inconsistent with the charge that the accused had given false information in saying that the goods had been disposed of. The prosecution could not take up the alternative position, the two offences are distinct and irreconcilable.

In this court the matter has clarified, and the learned Magistrate's finding that the goods have not been disposed of is not supported. Some slight attempt was made to urge on behalf of the accused that what they both admitted had happened did not amount to 'disposal' within the terms of the orders, and the terms of rule 75A, but this was not seriously pressed. Though there was no actual removal of the goods from the godown, the admissions of both the accused amount to admissions of receipt of a deli-

very order by the purchaser, and payment of money by the purchaser to vendor's agent the result was certainly a disposal of the goods; disposal does not mean any actual removal or delivery by actual movement of the goods. In our opinion such actual delivery would also have constituted a disposal of the goods, but the question does not arise here. The actual delivery order is not before the court. It was contended that the question whether property in the goods passed by handing over of the delivery order or not would depend on the intention of the parties, as to whether the property was to pass before payment of money or not. Mr. Ghose relying on the letter of 31st December, in Ex. 57 referred to above, contended that the disposal was complete with the issue of the delivery order, and that therefore whatever might be the effect as regards the partners of the Firm, Joshi by accepting the half price did nothing by way of disposing of the goods. In our opinion even assuming that the intention was that the property in the goods should pass with the delivery order, the subsequent acceptance of the money by Joshi was another act of disposal, as would also have been actual delivery of the goods by him if he had allowed the purchaser to remove the goods. The nature of the act of disposal by him has some bearing on the question of the seriousness of his offence.

This then disposes of the second ground for acquittal set forth by the learned Chief Presidency Magistrate. No attempt has been made before us to suggest that there was any contravention of the freezing orders in so far as they demanded information. Information asked for in the letter of 24th November (Ex. 10) viz. production of the Customs and other documents, was not supplied but no charge was framed in respect of this matter, and presumably no charge could be framed in the absence of a formal order demanding the information. The first ground set out by the learned Magistrate is correct, and the charges would fail if they rested on the failure to supply information.

It is not necessary for us to discuss the reasons given by the learned Magistrate set out under 3 (i) (ii) and (iii) above. The learned Magistrate finds that Futnani told an untruth, but acquits him for what may be called technical reasons, we find that the information given was true; the prosecution has not attempted to urge that any distinction should be made from the use by Futnani in Ex. 18 of the phrase 'delivered away' instead of the more strictly accurate 'delivered'. No doubt the authorities were misled if they thought that the goods were right out of the

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control of the firm Murlimal Santram in the sense that they could not say where they were. It is not very clear why the authorities did not enquire where the goods were ; they had power to demand the information. Apparently they misled themselves into thinking that they were really dealing with a 'strightforward' man, as Futnani describes himself ; it was an error on their part.

We are concerned with ground (4), for some attempt was made before us to contend that there had been a misjoinder of charges. We think the learned Magistrate in this matter was in part correct, and in part wrong. He was perhaps misled by the double aspect in which the charge under rule 46(d) was put before him. If the prosecution case was that Futnani misled the authorities by making a promise, which he never meant to keep, in order to get out of the difficulty created by a contravention of the freezing order having been made, then clearly there was a misjoinder of charges. The latter offence was entirely separate from the former, though arising out of it. But it was quite legitimate for the prosecution under section 236 of the Code of Criminal Procedure to charge the accused in the alternative either that they had delivered the goods, that is to say disposed of them in contravention of the order of 22nd November, or had falsely informed the authorities that they had done so. The prosecution proved the whole series of acts from the time of the application for the licence till the time when the accused came to express regret that the goods had been 'delivered away'. What exactly had happened was within the special knowledge of the accused, and the prosecution were entitled to contend, that they had proved commission of one or other offence. Though the charge under rule 46 (d) was not actually framed as alternative to the other charges, this was the intention and effect ; they were otherwise in this sense inconsistent, in the same way that all alternative charges in this sense must be inconsistent. A man may be charged in the alternative as a thief, receiver or a guilty of breach of trust, but the charges are inconsistent between themselves. We hold then that there was no misjoinder of charges, though it would have been more correct to frame the charges in the alternative. The fact that in argument at a late stage the prosecution sought to meet a defence argument by contending that the evidence proved a different charge in no sense alternative to the charge under rule 75A cannot make the proceedings void on the ground of misjoinder. The answer to the argument

was simply that that charge had not been tried and could not be tried in the current trial.

The result is that we must hold that the reasons given by the learned Chief Presidency Magistrate for acquitting the accused on the charges under rule 75A of the Defence of India Rules cannot be supported. The following additional points were however urged before us :—(1) Contravention of an order made under rule 75A is not punishable at all where the contravention took place in December 1941, and a prosecution was started in respect of it in September 1942 ; (2) that a valid order cannot be passed against a firm under rule 75A ; (3) that there is no provision for service of an order made under the rules against firm (or for that matter on company) ; (4) that the Defence of India Act 1939 is *ultra vires* the Indian Legislature. We proceed to discuss these points seriatim.

(1) The first point though argued at some length was eventually abandoned it is worth while discussing it briefly as the fallacy on which it was based has given trouble in previous cases on the Defence of India Rules, and has not, we think, been noticed as yet in this court. It was pointed out in the case of *Dan Mall Sharma* v. *Emperor* (1). Rule 5 of the Defence of India Rules as originally framed was as follows :

"If any person to whom any provision of these Rules relates, or to whom any order made in pursuance of these Rules is addressed or relates, or who is in occupation, possession or control of any land, building, vehicle or other thing to which such provisions relate, or in respect of which such order is made—

(a) fails without lawful authority or excuse, himself or in respect of any land, building vessel or other thing of which he is in occupation, possession or control, to comply, or to secure compliance, with such provisions or order,

or

(b) evades or attempts to evade, by any means (such provisions or orders,—he shall be deemed to have contravened such) provisions of these rules, or as the case may be, such provisions of these rules as authorise, the making of such order ; and [in these rules the expression "contravention" with its grammatical variations includes any such failure, evasion or attempt to evade."

The penalty clauses relating to some of the rules merely provided a penalty for breaches of the rules. It was consequently

(1) A. I. R. 1944 Pat. 1.

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urged successfully, overlooking the provisions of rule 5, that breaches of some orders had not been made punishable. Rule 5 was amended by notification No. 1020—OR/41, dated 10th January, 1942, and for the words "such provision of these rules, or, as the case may be, such provisions of these rules authorise the making of such order" the words "such provision or order" were substituted. This rendered it necessary consequentially to amend other rules where necessary provision for punishment for a breach of an order made under them had not been made.

Rule 75A was such a rule. In the original rules requisition of immovable property was dealt with in rule 75, requisition of land in rule 79 and requisition of moveable property in rule 83. Rules 76 and 83 contained provision for punishment for contravention of an order made under them, rule 79 did not. The rules were amalgamated into rule 75A by notification No. 1336—OR/42 dated the 25th April, (after the amendment of rule 5), but contained provision only for punishment of a breach of the rule itself. The omission was not corrected until the issue of notification No. 1500—OR/42 dated the 18th July, 1942, when orders made under the rule were made punishable. Orders made, and action taken in relation to rules 76, 79, 83 were by sub-rule (6) of the new rule to be deemed to have been made or taken under or in relation to rule 75A and to be as valid as if the rule had then been in force.

The relevant period in the present case is December, 1941. By rule 3 of the Defence of India Rules the General Clauses Act, 1887, applies to the interpretation of those rules as it applies to the interpretation of a Central Act. Consequently the provisions of section 6 (d) and (e) of that Act are applicable to the present case and the accused are punishable in the present proceedings if at all, under the rules as they stood in December, 1941. The freezing order of the 22nd November (Ex. 8/1) was of course issued under rule 83 (3a) then in force, and the accused are punishable, if at all, under sub-rule (4) as it then stood ; this made punishable a contravention of any order made in pursuance of the rule. It is not even necessary to call in the provisions of rule 5 as it then stood for the purpose of making punishable such contravention. The amendment of rule 5 on the 10th January 1942, cannot affect the matter. The repeal of rule 83, and substitution of rule 75A on the 25th April, 1942, would affect the question of contraventions taking place after that date, and till

the subsequent correction on the 10th July, 1942, but not the matter of any contraventions that had taken place prior to that date. All that need be said is that the charges in the present case are slightly defective in mentioning rule 75A at all. The accused are being tried now for a contravention in December, 1941, of an order made under rule 83 (3a) then in force, and punishable under rule 83(4) as it then stood. The defect in the charges has in no way prejudiced either of the accused. The terms of rule 75A (5) relating to freezing orders are identical with those of rule 83(3a) with the exception of an amendment relating to buildings of no importance in the present case. The arguments proceeded with reference always to rule 75A, following the charges and the judgment of the learned Chief Presidency Magistrate and have been set out accordingly above; strictly the reference throughout should be to rules 83(3a) and (4)

(2) There is no substance in the contention that an order under rule 83(3a) cannot be issued on a firm. In this case the owner or person in possession of the 25 tons of barbed wire was clearly the firm of Murlimal Santram & Co. "Person" under section 3(39) of the General Clauses Act is defined to include (unless there is anything repugnant in the subject or context) "any company or association or body of individuals whether incorporated or not". The firm applied for the import licence (over the signature in the writing of Futnani) and all documents are in the firm name. The firm no doubt is not an entity, it is a partnershsp registered under the Indian Partnership Act, as stated by Futnani in his written statement. Under section 4 of that Act "Persons who have entered into partnership with one another are called individually 'partners', and collectively a firm..... .....", the firm means the partners collectively, and orders under rule 83(3a) can certainly be issued on such a body of persons collectively. The order Ex. 8/1 was a valid order directed to the partners collectively of the firm of Murlimal Santram & Co. forbidding them or their agent from disposing of the barbed wire received by S. S. Frederick Lykes.

(3) Rule 119 of the Defence of India Rules is the relevant rule as regards service. The form in which it stood on the relevant date in November, 1941 was as followes :—

(1) Save as otherwise expressly provided in these Rules every authority, officer or person who makes any order in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such

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order in such manner, as may, in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns and in the case of an order affecting an individual person serve or cause the order to be served on that person in such manner as such authority, officer or person thinks fit".

It is contended that there is a lacuna in the rule, which was removed by subsequent amendment, and that there is no provision in it for service on a firm or company. The context prevents the definition of 'person' in the General Clauses Act from being applicable to an 'individual person'. In our opinion the provision in respect of a firm and company is for publication to them as a 'class of persons'. Service is publication to the individual or individuals served. The Defence of India Rules, instead of providing fairly detailed rules for the method of informing those concerned of the existence of orders affecting them in the manner in which provisions are made for giving information as regards suits, for example, in the Code of Civil Procedure, have left to the authorities empowered to pass orders under the Defence of India Rules, a wide discretion as to the manner of giving such information. Under the Code there is provision for publication in certain instances where the ordinary rule of personal service cannot be carried out, e. g. under Order 1 rule 8 where individual service on a large number of persons is not reasonably practicable, or substituted service under Order 5 rule 20 where service cannot be effected in the ordinary way. The fact that by a subsequent amendment of rule 119 provision has been made for service on companies as under Order 29 rule 2, and on firms as under Order 30 rule 3, does not show that there was no provision previously under rule 119 for informing such associations of individuals of orders affecting them. The method adopted in the present case was to send the order to the Calcutta Manager of the firm after he (Joshi) had interviewed the authorities, and has corresponded with them signing 'per pro' the firm (Ex. 5) saying he was consulting his head office. It would have been better if "publication" had also been made direct to the firm in Karachi, but in view of the p ssible delay it was also essential that the order should be also served on the Calcutta agent who was actually handling the matter and taking delivery of the goods from the ship. He was clearly in communication with his head office, and in the circumstances there was nothing unreasonable in the issuing authority holding the opinion that the method used was that best adapted

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for informing the partners collectively, whom the order concerned and their agent in Calcutta, whom it also concerned. In our opinion rule 119 as it stood in November, 1941, provided a method for informing a firm of an order affecting it, and the firm was properly informed in this case in accordance with the provisions of the rule.

We have already held that the goods in question were disposed of in contravention of the order, both by the issue of the delivery order to Dewan Chand Nikamal in Karachi, and also by the acceptance of half the purchase money from their agent in Calcutta by Joshi. Joshi certainly had actual knowledge of the order and he clearly failed to comply or secure compliance with it; he therefore contravened the order, and is liable to the punishment provided in rule 83 (4).

As regards Futnani he attempts to throw the blame on Joshi in Calcutta, and some unnamed person in Karachi who made over the delivery order. He alleges he was absent from Karachi, on his way to Calcutta *via* Delhi, at the time when the order was made over on the 20th December, and when Joshi accepted the money in Calcutta. He was one of the persons (partners) to whom the order related and to whom it was addressed; he was informed of the order as required by the rules, and he failed to secure compliance with it. The only question is whether he had any lawful excuse for such failure. The onus is on him to prove such lawful excuse, and he has made no real attempt to do so. We do not accept his statement that he had nothing to do with the sale of the goods till he came to Calcutta in December and corresponded. He signed the application for the import licence (Ex. 1) he signed the letter Ex. 6 dated 18th November supplying the information asked for in the Controller of Supplies' letter Ex. 4 of the 12th November. In that letter he explicitly stated that the reels had already been sold, that as owing to shortage of stocks these goods were much in demand, "we have therefore sold, almost all of them prior to their arrival". When further information was asked for, in particular, production of the documents, Joshi came to the office of the Controller on the 8th, and then wrote on the 13th December, stating that a partner was starting on Sunday the 14th, who would handle the matter personally, and that partner was Futnani, who duly arrived and in fact handled the matter, and continued to do so for some months. There can be no doubt that Futnani in fact knew all about the sale, and the freezing order. If the delivery order was not in

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fact handed over in Karachi under his instructions, he certainly failed to secure compliance with the freezing order, and, as we have said, has offered no excuse for his failure beyond his plea of ignorance which we cannot accept. We may note here the inconsistency between the excuse offered for Joshi, namely that he was unable to consult Karachi on the 20th owing to difficulty of telegraphic communication, and the stery that the delivery order was handed over in Karachi on the 20th, and Dewan Chand Nikamal were told to instruct their Calcutta friends by phone to take delivery in Calcutta, which they did it in part by visiting Joshi, inspecting the goods and paying part of the price. According to Joshi the post operated with phenomenal rapidity, for Dewan Chand's man in Calcutta had the actual delivery order that day.

It was urged that to convict Futnani we would be going against the fundamental common law applicable as regards criminal cases, and that we were throwing the onus on him to prove his innocence. The doctrine obviously has no application to statutory offences of the type created by rule 5 read with many of the other rules framed under the Defence of India Rules. In the case of any company or other body corporate there is under rule 122 express provision throwing the whole onus on every director, manager, secretary or other officer or agent to prove where the 'person' contravening the provisions of a rule or order thereunder is such company, that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, otherwise, he 'shall.....be deemed to be guilty of such contravention'. There is a similar provision for example in relation to lighting restriction orders under rule 52 (1).

We therefore find that the accused Futnani is also guilty of contravention of the freezing order Ex. 8/1 and liable to punishment under rule 83 (4).

As regards punishment we take the view of the facts most favourable to the accused, namely that the contravention by Futnani was not deliberate, but was a mere failure to secure compliance with the order; and that as regards Joshi, he, by accepting the money merely carried the contravention a stage beyond that reached by the issue of the delivery order in Karachi. We consider the appropriate punishment for Futnani to be a fine of Rs. 1000 in default one month's rigorous imprisonment.

(4) It remains to dispose of the last point raised by the

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defence, namely that the Defence of India Act is *'ultra vires'* the Central Legislature. In support of this contention reliance is placed on the case of *King-Emperor* v. *Benoari Lall Sarma* (1). A similar contention was put forward in this Court recently in the case of *Keshabdeo Harlalka* v. *The Emperor* (Criminal Revision No. 529 of 1943) and rejected. There is no discussion however in the judgment in that case of *Benoari Lall's* case (1) which is relied on in the argument before us; we entirely agree with the view taken in that case, and proceed to deal with the arguments before us.

Benoari Lall's case (1) deals with Ordinace II of 1942 made and promulgated by the Governor-General early in 1942 under powers given under section 72 of the Government of India Act, 1915, kept in force by the provisions of section 317 of the Government of India Act, 1935, and included in the ninth schedule of of that Act, and further amended by the provisions of the India and Burma (Emergency Provisions) Act 1940, passed by the Imperial Parliament. Section 3 of the latter Act extended the period of six months fixed under section 72 of the Act of 1915 to a period lasting from the date of the Act and ending on such date as His Majesty might by Order in Council declare to be the end of the emergency which was the occasion of the passing of the Act of 1940. The functions were to be exercised by the Governor-General in his discretion (section 1 (4)) and without prejudice to the provisions of section 314 of the Government of India Act, 1935 (providing for control by the Secretary of State), the powers exercisable under the new Act were not to be exercised except on the direction of the Secretary of State, subject to a proviso covering cases where reference to the Secretary of State might cause undue delay (Section 4).

The majority judgment in *Benoari Lall's* case (1) analysed the provisions of Ordinance II of 1942, in particular sections 5, 10 and 16, and concluded that it was only the order of the executive authority passed under those sections which in fact operated to repeal the provisions of the Criminal Procedure Code, and there was nothing in the Ordinance to limit the discretion given to the executive, or laying down the policy, conditions or criteria by reference to which the power was to be exercised. It held that it is impossible to deny that the Ordinance making authority has wholly evaded the responsibility of laying down any rules or con-

(1) (1943) 47 C. W. N. (F. R.) 41.

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ditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary Criminal Courts and to the Special Courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities.

The Federal Court discussed the cases of The *Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2) and *Powell* v. *Apollo Candle Co.* (3) and *Shannon* v. *Lower Mainland Dairy Products Board* (4), concluding that "A careful examination of these pronouncements of their Lordships does not support the contention that in their view every kind of delegation by the Legislature is unquestionable. On the other hand, they have taken care to limit their pronouncements by reference to the nature and terms of the particular enactments impugned before them and by reference to what has prevailed as a matter of long legislative usage".

On the question of powers of delegation American authorities are discussed, and a test put forward by the Advocate General of India was accepted and applied. The fallowing quotation from the judgment of Dixon, J. in *Victoria Stevedoring, etc. Co.* v. *Dignan* (5) is quoted as noteworthy. "This does not mean that a law confining authority to the executive will be valid however extensive or vague the subject matter may be, if it does not fall outside the boundaries of federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply on considerations of weight affecting the validity of an Act creating a legislative authority. (P. 63).

The judgment proceeds (p. 64). "The circumstance that the matter has in the present case been dealt with by an Ordinance and not by a legislative enactment of the ordinary kind raises a further question under this head. The decisions in *Burah's* case (1) and the cases following it rest on the ground that within the limits of the subject mater assigned to them by the Constitution Act, the Indian and Dominion Legislatures have and were

(1) (1878) L. R. 5 I. A. 178 ; 3 App. Cas. 889 ; I. L. R. 4 Calc. 172.
(2) (1883) 9 A. C 117.
(3) (1885) 10 A. C. 282.
(4) [1938] A. C, 708.
(5) (1931) 46 C. L. J. 73 (81).

intended to have "plenary powers of legislation as large and of the same nature as those of Parliament itself". The following points of difference between legislation by Ordinance and ordinary legislation are then set out :—

(1) By the terms of section 72 in the ninth schedule to the Constitution Act, the operation of the Ordinance is limited to six months, and even now is only temporary though the particular limit has been removed.

(2) It is avowedly the exercise of a special power intended to meet an emergency.

(3) "These two circumstances differentiating legislation by Ordinance from normal legislation afford ground for doubting the applicability of the principle of *Burah's* case (1) to Ordinances".

(4) It is only consistent with this kind of law-making that the responsibility for it should have been laid on the Governor-General. The conception underlying the Ordinance making power so connects it with the personal judgment and discretion of the Governor-General that the objection against delegation to subordinate executive authorities of any matter of principle is even more serious in this case.

(5) In England Parliament has control over emergency legislation by Order in Council. Under the Indian Constitution the Legislature has no share in or control over the making of an Ordinance or the exercise of powers thereunder.

(6) In England Parliament will pass the usual Indemnity Act, in India the indemnity can be provided by Ordinance. The only safeguard in the Indian Constitution is that the matter rests entirely on the responsibility of the Governor-General.

(7) When large and undefined powers are entrusted to Provincial Government and their executive officers, the constitutional limitations, conventions and etiquette implied in the theory of provincial autonomy make it difficult even for the authority promulgating the Ordinance to interfere to check the improper use of such powers.

Certain considerations and safeguards as regards delegation of legislative authority are discussed, and it is remarked "the considerations and safeguards suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under Constitutions like the

(1) (1878) L. R 5 I. A. 178; 3 App. Cas. 889; I. L. R. 4 Calc. 172.

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Indian and American, where the constitutionality of legistation is examinable in a Court of Law, these considerations are, in our opinion, an integral and essential part of the limitation on the extent of delegation of responsibility by the Legislature to the executive", and then follows the passage already quoted above holding that the Ordinance making authority had wholly evaded his proper responsibility in the case of Ordinance II. The earlier passage, coming between the discussion of the special difference as regards exercise of the Ordinance making power, and the final conclusion as regards the Ordinance under discussion, is general in its terms but is presumably not intended to overrule the principle of *Queen* v. *Burah* (1) and subsequent cases in its application to ordinary legislation by the legislature.

The Defence of India Act, 1939, came into force on the 29th September, 1939. On the declaration of war the Governor-General in Notification No. 22-M of the 3rd September issued a Proclamation Emergency in pursuance of the power conferred by section 102(1) of the Government of India Act, and promulgated the Defence of India Ordinance, V of 1939, under the powers conferred under section 72. At the same time the Defence of India Rules, made under the Ordinance were published in Notification No. 221/1 C. R. The terms of the Ordinance are substantially the same as those of the subsequent Defence of India Act, which was passed shortly afterwards by the Indian Legislature and the present Rules in force were made under the Ordinance. Section 21 of the Act repealed the Ordinance and enacted that any rules made, anything done and any action taken in exercise of any power conferred by or under the Ordinance was to be deemed to have been made, done or taken in exercise of powers conferred by or under the Act as if the Act had commenced on the 3rd day of September, 1939. It should be added that on the 1st September, the Imperial Parliament had passed the Government of India (Amendment Act) 1939 introducing a new section 126A extending the executive authority of the Federation, and the power of the Federal duties on officers of the Federation, notwithstanding that the matter was one with respect to which the Provincial Legislature also had power to make laws. The new section was given retrospective effect.

(1) (1878) L. R. 5 I. A. 178; 3 App. Cas. 889; I. L. R. 4 Calc. 172.

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The effect of the proclamation of Emergency under section 102 of the Government of India Act was that wider powers were given to the Federal Legislature, namely powers to make laws for a Province or any part thereof with respect to any of the matters in the Provincial Legislative List. In other words no question of distribution of powers could arise in examining any enactment made by the Federal Legislature while the Proclamation was in force Under section 316 of the Act—references to the Federal Legislature are to be taken as references to the Indian Legislature. Control of Parliament was retained by the provision in section 102 that the proclamation was to cease to operate at the expiration of six months, unless before the expiration of that period it had been approved by Resolutions of both Houses of Parliament. Laws so made are to cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate.

Of the seven reasons discussed in *Benoari Lall's* case (1) as distinguishing an Ordinance from a legislative enactment of an ordinary kind some seem to apply also to the Defence of India Act. It is an enactment by the ordinary legislature, but it has a temporary validity (cf. (1) above); it is avowedly the exercise of a special power to meet an emergency (cf. (2)). On the other hand (cf. (7)) the constitutional limitations, conventions and etiquette implied in the theory of provincial autonomy have not the same application apparently as discussed by the Federal Court. Special power to give directions to Provinces are given in the amended sections 126A of the Government of India Act, and the whole field of legislation is opened to the Federal Legislature. As to the control of Parliament, the continuance of the Proclamation of Emergency itself is made subject to Parliament's control by section 192 itself. Under section 314 of the Act the Governor-General is under the general control of and must comply with the directions of the Secretary of State. In these circumstances we cannot think that there can be any doubt that as regards the Defence of India Act, the principle of *Queen* v. *Burah* (2) and the latter cases must apply. Section 102 of the Government of India Act so far from showing any intention to restrict the legislative powers for the emergency of war deliberately widens them. The considerations applicable in the present case are different from those which weighed with the majority of the Federal Court in *Benoari Lall's* case (1).

(1) (1943) 47 C. W. N. (F. R.) 41.

(2) (1878) L. R. 5 I. A. 178; 3 App. Cas. 889; I. L. R. 4 Calc. 172.

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We may now examine the Defence of India Act to consider whether the Indian Legislature has exceeded the limits of its powers as laid down by the Judicial Committee. In section 2(1) the Central Government is given power "to make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order, or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community." In section 2(2) are set out thirty five matterss pecifically for which rules may be made. These necessarily cover a very wide field, and if there were any necessity for examining the Act with reference to the distribution of legislative powers then it might be found that there was "such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to particular head or heads of legislation," in the words of Dixon, J. in *Victorian Stevedoring etc. Co.* v. *Dignan* (1) already quoted above. The purpose and intent of the Act are, however quite clear, the width of the subject matter arises out of the nature of the emergency viz. war.

Martin, C. J. dealt with an objection on the ground of excessive delegation of powers in the Natural Products Marketting (B. C.) Act—4 D. L. R. 298) where it was contended "that the Legislature had passed only the skeleton of an Act and left it to the sole discretion of the Governor-General to cloth it with flesh and blood, thereby in effect abdicating its functions," by pointing out that the "purpose and intent" was laid down in the Act and was not vague and uncertain but definite and concrete, to control and regulate within the Province marketting of its natural products by establishing "schemes". He pointed out that the schemes were defined, and the powers to be given to the Boards were specifically set out in eleven sub-sections of section 5 of the Act. He therefore held that "after reading the whole statute it does not support the argument" that it was a mere skeleton. He then referred to the authority of *Hodge* v. *The Queen* (2) to show that the legislature had the power to establish such schemes quoting the passage in the judgment in that case in which it is laid down that the authority conferred on the Provincia Legislature is "as plenary and as ample within the limits prescribed by section 92 (of the British North America Act) as the Imperial Parliament or the Parliament of the Dominion

(1) (1931) 46 C. L. R. 73.
(2) (1883) 9 A. C. 117.

would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

"It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail ..... ". It was argued at the bar that a legislature committing important regulations to agent or delegates effaces itself. "That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or taken the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide." On appeal in *Shannon v. Lower Mainland Dairy Products Board* (1) Lord Atkin observed that the objection that the impugned act delegated legislative power to the Lieutenant-Governor was subversive of the rights which the Provincial Legislature enjoys "while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion, and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act. Martin, C. J. appears to have disposed of this objection very satisfactorily in his judgment on the reference and their Lordships find no occasion to add to what he there said."

In view of the emphatic confirmation of the judgment of Martin, C. J. in the above passage, we may refer also to his discussion of the question of abdication of powers. On this subject Martin, C. J. had quoted passages from judgments in *Re Gray, Re Habeas Corpus* (2) where it had been held that "when the nation is in peril then that emergency justifies the national Government in invading by an extraordinary exercise of its 'peace, order and good government' powers (section 91 B. N. A. Act) the ordinary powers of the Provinces over 'Property and Civil Rights in the Province' (section 92 (13).) during the existence of an emergency." He then cites with approval the following passage

(1) [1938] A. C. 708.

(2) (1918) 42 D. L. R. 1.

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from the judgment of Anglin, J. in that case :—" A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is as plenary and as ample.....as the Imperial Parliament in the plenitude of its powers possessed and could bestow. "

A further passage quoted from the same judgment is of special interest when war legislation like the Defence of India Act is under consideration. " Again it is contended that should section 6 of the War Measure Act be construed as urged by the counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our parliamentary institution. With such a matter of policy we are not concerned. The exercise of a legislative function such as those here in question by the Governor in Council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extrarodinary measures. At all events all we, as a court of justice, are concerned with is "to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them".

The views of Duff, J. in the same judgment are also quoted and are apt in the present connection.

There is no attempt to substitute the executive for "Parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by Parliament, which Parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law making authority is vested by it is intended to act as the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law".

We are of opinion therefore that the Defence of India Act in no ways transgresses the limits laid down and indicated in the above passages which received the full approval of their Lordships of the Judicial Committee on appeal. The fourth objection raised in this appeal thus fails.

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We therefore allow the appeal and convict the accused Futnani and Joshi of contravention of the freezing order of 22nd November, an offence punishable under rule 83(4) of the Defence of India Rules as they stood at the time of the contravention. We sentence Futnani to pay a fine of Rs. 1000 in default to suffer three months simple imprisonment, and Joshi to pay a fine of Rs. 100 in default to suffer one month's simple imprisonment.

Certificate under section 205 of the Government of Indin Act is granted.

Edgley, J. :—I agree.

A. T. M. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Roxburgh, and *Mr. Justice Ormond.*

AMARENDRA CHANDRA CHAKRAVORTY

v.

GARRISON ENGINEER 926 INDIAN WORKS SECTION, FENI AND OTHERS.*

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1945.

March, 21.

Habeas Corpus—Section 491, Criminal Procedure Code (Act V of 1898)—Delivery of person liable to be tried by Court-martial, charged under section 41 of the Indian Army Act (VIII of 1911), when offence not stated under section 549(1), or when requisition not made under section 549(2) of the Criminal Procedure Code.

An application for directions of the nature of a Habeas Corpus in respect of a person employed as a Siding Supervisor of a certain Air Field and delivered to the Military authorities by the trying Magistrate for trial by Court-martial, without requisition from the Commanding Officer of a Regiment as contemplated in section 549(2) of the Criminal Procedure Code or without a statement of the offence of which the person is accused, as required by section 549(1) of the Code, will prove infructuous, if before the final hearing of the same the Military authorities decide that the person will be tried by Civil Magistrate and release him from custody on bail, with that end in view.

*Criminal Revision Case No. 357 of 1945, under section 491 of the Code of Criminal Procedure.

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Application under section 491 of the Code of Criminal Procedure for directions from the High Court in the exercise of its Ordinary Original Criminal Jurisdiction of the nature of Habeas Corpus.

The Court passed the following order.

The above application was made by the petitioner under the following circumstances: The petitioner was appointed a "Siding Supervisor" by the Garrison Engineer, Indian Works Section of a certain prohibited place within an Area in Eastern Bengal to supervise the works of certain labourers. Sometime after, he was removed from his service and on the written complaint of the Garrison Engineer of the Indian Works Section, marked as "Confidential" charging him with having extorted money from his subordinates, the Sub Divisional Magistrate of Feni issued a warrant of arrest against the petitioner through the Garrison Engineer under section 406/324 of the Indian Penal Code and got him arrested. The petitioner unsuccessfully moved the Sub-Divisional Magistrate and thereafter the Sessions Judge of Noakhali for bail, but eventually obtained bail from the High Court. The petitioner was subsequently re-arrested on a warrant from the Magistrate of Feni, as he was claimed for trial by court-martial by the Officer Commanding 926 Indian Works Section. The petitioner was accordingly handed over to the Military under section 549 of the Code of Criminal Procedure. The Commanding Officer took the petitioner into Military custody and keeping him there for one day, sent him back to the Sub-Divisional Magistrate for detention in Feni Sub-Jail until further orders. The Sub-Divisional Magistrate thereupon lodged the petitioner in Feni Sub-Jail in compliance with directions from the Military authorities, but made a reference to the District Magistrate of Noakhali for necessary orders as he found no provision of law for detention in custody of an ordinary Criminal Court of a person claimed for trial by Court-martial. On an application for bail before the Sub-Divisional Officer at this stage the learned Officer neither granted nor rejected it but simply passed an order that if the Military would not take back the petitioner into their custody, bail would be granted according to the previous orders of the High Court. On a further application being made by the petitioner for copy it was discovered that the requisition of the Military authorities as contemplated by section 549(2) of the Criminal Procedure Code was not available, as the records of the case had already been handed over to

the Officer Commanding under section 549(2) of the Code. The petitioner thereupon moved the Habeas Corpus petition before this Court and contended inter alia, that the petitioner was not subject to the Indian Army Act and could not be claimed for trial by the Court-martial under section 41 of the Act, that the military authorities having initiated the proceedings before the Sub-Divisional Magistrate (Civil) was incompetent in law to claim trial of the petitioner by court-martial except in conformity with the provisions of section 549(2) or without the Magistrate's order stating the offence as contemplated in section 549(1) of the Code which was wanting in the case, that the arrest of the petitioner notwithstanding the grant of bail by the High Court and his detention thereafter in custody was illegal and improper, and that there has been a fraud on the statute, and an abuse of the powers given by the lagislature.

Their Lordships thereupon issued a Rule in the following terms :

"Let a Rule issue under section 491 (1) (a), (b) and (d) of the Code of Criminal Procedure calling upon the District Magistrate, Noakhali, and the Superintendent of Feni Sub-Jail to show cause why the petitioner who has been illegally or improperly detained in custody should not be brought up before the Court to be dealt with according to law or set at liberty or why the petitioner detained as aforesaid should be brought before a Court-martial for trial.

The Rule is made returnable in a fortnight."

Messrs. Sreenath Das, Biraj Mohan Roy and *Sudhir Chandra Banerjee* for the Petitioner, appeared in support of the Rule.

Mr. Amiruddin Ahmed for the Crown submitted that according to his information, the Military authorities had decided not to proceed against the petitioner under the Indian Army Act and the petitioner had already been enlarged on bail, and consequently the Rule had become infructuous.

Mr. Das submitted that this was but another dodge played by the Military authorities with a view to get round the Rule, and prayed for a decision on the points raised in the case in the interests not only of the petitioner but also of the public at large.

Ruxburgh, J: Mr. Das, you have after all gained your object. Your client has got back his body. There can be no point now in bringing him up before this Court.

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Mr. Das : My case being that the petitioner was illegally and improperly detained, your Lordships may be pleased to decide whether or not he was so detained.

The judgment of the Court was delivered by

Roxburgh, J. : The petitioner may, if so advised, sue in damages for the wrongful detention.

Thereupon the following judgment was delivered by the Court :

We are informed that the petitioner has been released on bail, the military authorities having decided that he will be tried by the ordinary civil courts.

The result is that this Rule is accordingly discharged.

R. M. *Rule discharged.*

FEDERAL COURT.

PRESENT : *Sir Patrick Spens, Chief Justice, Mr. Justice Varadachariar and Mr. Justice Zafrulla Khan.*

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HULAS NARAIN SINGH

v.

DEEN MOHAMMAD MIAN AND OTHERS.

[IN THE MATTER OF AN APPLICATION FOR REVIEW OF THE JUDGMENT OF THE FEDERAL COURT, DATED 15th APRIL, 1943].

Review—Judgment of Federal Court.

The Federal Court cannot entertain an application for review of its own judgment except in certain circumstances. The maxim *Interest reipublicae ut sit finis litium** is to be taken into account in every case. The power to review is one to be exercised with extreme caution and only in very exceptional cases. In such cases, when by misprision in embodying the judgment, errors have been introduced, a rehearing at the instance of one of the parties is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. The judgment cannot be reopened only for the reason that new evidence is forthcoming.

*Meaning "It concerns the State that there be an end to law suit"—Desai.

Raja Prithwi Chand Lall Chowdhry v. *Sukhraj Rai* and *Subhanand Chowdhury* v. *Apurba Krishna Mitra* (1); *Rajunder Narain Rae* v. *Bijai Govind Sing* (2); *Appa Rao, In re* (3) and *Srimantu Raju Yarlagaddu Durga* v. *Srimantu Mallikarjunna* (4) followed.

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Federal Case No. XIV of 1942.

Sardar Ragubir Singh, (Advocate Federal Court), instructed by *Mr. Tarachand Brijmohanlal* Agent for the Applicant.

The following order was passed :

By the Court.—This is an application for review of the judgment of this Court in *Hulas Narain Singh and others* v. *Deen Mohammad Mian and others* delivered on April 15, 1943. In *Raja Prithwi Chand Lall Chowdhry* v. *Sukhraj Rai* and *Subhanand Chowdhury* v. *Apurba Krishna Mitra* (1) we indicated the circumstances which might possibly warrant the entertainment of such an application. Nothing of that kind has been shown to exist in this case. The application is therefore dismissed.

A. T. M.

(1) (1940) 74 C. L. J. 90; (1940) F. C. R. 78.
(2) (1839) 2 Moo. I. A. 181.
(3) (1886) I. L. R. 10 Mad. 73 (78); L. R. 13 I. A. 155; 11 App. Cas. 660.
(4) (1891) I. L. R. 14 Mad. 439 (441).

PRESENT: *Sir Patrick Spens, Knight, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

HULAS NARAIN SINGH

v.

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[IN THE MATTER OF A PETITION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL UNDER SECTION 208(b) OF THE GOVERNMENT OF INDIA ACT, 1935, FROM THE JUDGMENT OF THE FEDERAL COURT.]

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Hulas Narain Singh
v.
Deen Mohammad Mian.

Leave to appeal—Privy Council—Substantial question of law—Legislation, if ultra vires—Finding affecting a large number of people—Effect and implications of the Permanent Settlement—Provincial legislature, if can enact measures regulating the rights and liabilities of landholders and ryots—'Proprietor'—Litigant trying to persuade the members of the Court to reconsider the case by forwarding direct to Court further matter.

Though the finding that section 178B of the Bihar Tenancy Act is not *ultra vires* the Bihar Legislature, is one affecting a large number of people, both zamindars and ryots in the Province of Bihar, the points of law being not substantial, leave to appeal to Privy Council is refused. The whole argument in support of the appeal was based upon the effect and implications of the Permanent Settlement.

The Permanent Settlement had not deprived the Provincial Legislature of the power to enact measures calculated to regulate the rights and liabilities of landholders and ryots *inter se* in the Province.

The expression 'proprietor' has been used in the Permanent Settlement only as denoting the person who is directly liable to pay the revenue to Government.

The effect and implications of the Permanent Settlement were fully discussed by Privy Council in *Prabhat Chandra Barua* v. *King-Emperor* (1) and by Federal Court in *Hulas Narain Singh* v. *The Province of Bihar* (2).

The action of litigant to persuade the members of the Federal Court after hearing and before judgment to reconsider the case by forwarding direct to the Court further matter not brought to their notice by Counsel at the hearing, strongly condemned.

Federal Court Case No. XLVIII of 1943.

Petition for leave to appeal to His Majesty in Council under section 208(b) of the Government of India Act, 1935 from the judgment of the Federal Court, dated the 15th April, 1943 in Case No. XIV of 1942.

Sardar Raghbir Singh (Advocate, Federal Court) instructed by *Mr. Tarachand Brijmohan Lal* Agent for the Appellant Applicant.

None for the Respondent Opposite Party.

The following order was delivered :

December, 1.

By the Court :—This is an application for leave to appeal to His Majesty in Council against the judgment of this Court in *Hulas Narain Singh and others* v. *Deen Mohammad Mian and others* (Case No. XIV of 1942). The applicant, who is a zamindar of Bihar, instituted the original suit for recovery of rent from some of his ryots, on the footing that by the custom of the estate he was

(1) (1930) I L. R. 58 Calc. 430 ; 52 C. L. J. 225.
(2) (1942) F. C R. 1 ; (1942) 75 C. L. J. 123.

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entitled to a half share of the produce by way of rent. In 1937, the Bihar Legislature had enacted section 178-B of the Bihar Tenancy Act, limiting the rent to nine-twentieths of the produce. The plaintiff contended that this provision was inoperative and *ultra vires* the Bihar Legislature. The contention was rejected by the High Court at Patna and by this Court also.

It is true that the question raised in the litigation is one affecting a large number of people, both zamindars and ryots, in the Province of Bihar. But the points of law are by no means substantial. The whole argument in support of the appeal was based upon the effect and implications of the Permanent Settlement; and this Court as well as the Courts in Bihar held that the Permanent Settlement had not deprived the Provincial Legislature of the power to enact measures calculated to regulate the rights and liabilities of land-holders and ryots *inter se* in the Province. In support of the application, reliance was placed on the fact that leave to appeal had recently been granted to one of the Taluqdars of Oudh. The position there was different. The circumstances attending the settlement with the Taluqdars gave scope for certain contentions based on the Crown Grants Act and on the doctrine that the Crown cannot derogate from its own grant. No such contention is available in this case. There was also the fact that the questions there raised had so far not been dealt with in any judgment of their Lordships of the Judicial Committee. As regards the Permanent Settlement however, we have clear pronouncements. As early as 1874, their Lordships of the Judicial Committee explained that the expression "proprietor" had been used in the Permanent Settlement only as denoting the person who is directly liable to pay the revenue to Government [See *The Collector of Trichinopoly* v. *Lekkamani* (1). The effect and implications of the Permanent Settlement were fully discussed by their Lordships in *Prabhat Chandra Barua* v. *King-Emperor* (2). This Court has dealt with the question not merely in this appeal, but also in *Hulas Narain Singh* v. *The Province of Bihar* (3). As pointed out in the judgment sought to be appealed against, the power of the Legislature to enact measures for the protection and welfare of ryots and other cultivators was expressly referred to and reserved at the time of the Permanent Settlement itself. This application is accordingly dismissed.

(1) (1874) L. R. 1 I. A. 282 (306); 11 B. L. R. 115.
(2) (1930) I. L. R. 58 Calc. 430; 52 C. L. J. 225.
(3) (1942) F. C. R. 1; (1942) 75 C. L. J. 123.

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We would add the following remarks:—After the last hearing before this Court and before judgment was delivered an attempt was made by the appellant to persuade the members of this Court to reconsider the case by forwarding direct to the Court further matter not brought to their notice by Counsel arguing the case at the hearing. This action on the part of the appellant appears to have been taken on legal advice. Again during the interval between the date when this application was heard and to-day, the appellant has approached members of this Court direct in the same way and apparently for the same purpose and again these approaches appear to have been made on legal advice. It is surely hardly necessary to state that this Court looks to Counsel at the hearing to put their client's case and that direct approaches to the Court outside the hearing are most improper and quite useless and that if it has been done under legal advice legal practitioners are acting most improperly in assisting in the preparation of or encouraging any such action on the part of lay clients.

A. T. M. *Application rejected.*

PRESENT: *Sir Patrick Spens, Knight, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

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December, 8.

THE BANK OF COMMERCE LTD. KHULNA
v.
AMULYA KRISHNA BASU ROY CHOWDHURY AND ANOTHER CONNECTED APPEAL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Ultra vires—*Bengal Money Lenders Act (X B. C. of 1940), section 36—Decree obtained on promissory note—Provincial Legislature, if can enact measures affecting promissory notes.*

Similar provincial legislation in pith and substance related to "money-lending and money-lenders" (Entry No. 27, List II of Schedule VII of Constitution Act), and any argument based on the exclusion of promissory notes from the sphere of provincial legislation will not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the provincial Act: *Subrahmanyan Chettiar v. Muttuswami Goundan* (1).

(1) [1940] F. C. R. 188; (1940) 73 C. L. J. 1.

The appellants' predecessor in title had obtained small cause decrees against the respondents in 1933 and 1938 respectively and certain payments had been made towards them. On August 30 and September 1, 1941, the judgment-debtors applied to the Court to re-open the decrees, scale down the debts and direct refund of amounts that might be found to have been over-paid on taking accounts according to section 36 of the Bengal Money Lenders Act, 1940. The judgment-debtors were awarded small amounts by way of refund.

Held, that to such class of cases, section 36 of the Bengal Money Lenders Act, 1940, was applicable though the decree was passed on claims arising out of promissory notes.

The Bengal Money Lenders Act falls within the description, legislation in respect of "money-lending and money-lenders," a subject within the exclusive competence of the Provincial Legislature. (Entry No. 27 in List II).

Assuming that the Bengal Money Lenders Act, 1940 affects and was intended to affect rights and liabilities based on promissory notes, it does not necessarily follow that the Act must be wholly void as *ultra vires* the Provincial Legislature.

That among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

In the event of a conflict between provisions contained in a provincial enactment so far as they bear upon promissory notes and provisions relating thereto contained in a Central enactment, such conflict should be resolved by an extension of the principle of section 107 of the Constitution Act by analogy or by the application of the Canadian doctrine of the "occupied field". The argument would not support the plea of *ultra vires*, but would only bring in the principle of repugnancy, that is, in the event of and in so far as there is a conflict between Provincial Legislation and Central Legislation, the latter shall prevail.

Subrahmanyan Chettiar v. *Muttuswami Goundan* (1) referred to.

In the present case, the Court is not concerned with the rights of parties under a promissory note. Here their rights and liabilities had merged in decrees even before the passing of the Bengal Money Lenders Act, 1940.

The question of the severability of the invalid provisions of an Act from the valid provisions is material only if the Act is in some measure held to be *ultra vires* the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a Central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. It is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied in this class of cases.

Section 36 (2)(a) of the Bengal Money Lenders Act, 1940, does not relegate

(1) [1940] F. C. R. 188; (1940) 73 C. L. J. 1.

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the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account taking sanctioned by the Act in place of the calculation on which the original decree was based.

Federal Court Cases Nos. I and II of 1943.

Messrs. P. R. Das and *P. C. Basu (Senior Advocates, Federal Court) (Mr. S C. Dutt, Advocate, Federal Court, with him)* instructed by *Mr. Ganpat Rai*, Agent for the Appellants.

Sir B. L. Mitter (Advocate-General of India) (Mr. K. K. Basu, Advocate, Federal Court, with him) instructed by *Mr. P. K. Bose*, Agent for the Respondents.

Mr. S. M. Bose (Advocate-General of Bengal) (Mr. B. Das, Advocate, Federal Court with him) instructed by *Mr. B. Banerji*, Agent for the Province of Bengal.

The judgment of the Court was delivered by

December, 8.

Spens, C. J. :—These appeals arise out of applications made by two judgment-debtors for relief under section 36 of the Bengal Money lenders Act, 1940. The appellant's predecessor in title had obtained small cause decrees against the respondents in 1933 and 1938 respectively and certain payments had been made towards them. On August 30 and September 1, 1941, the judgment-debtors applied to the Court to reopen the decrees, scale down the debts and direct refund of amounts that might be found to have been overpaid on taking accounts according to the provisions of the Act. To these claims the appellant Bank raised various objections, but they were overruled by the Subordinate Judge and the judgment-debtors were awarded small amounts by way of refund. The Bank took the matter on revision to the High Court at Calcutta, on the plea that the decrees had been obtained on "promissory notes" and that the Provincial Legislature had no authority to enact measures affecting promissory notes. This contention was overruled by the High Court on the authority of a Full Bench decision of that Court [*Harsukhdass Balkissendas* v. *Dhirendra Nath Roy* (1)]. The Full Bench judgment was based on the decision of this Court in *Subrahmanyan Chettiar* v. *Muttuswami Goundan* (2). The *ratio decidendi* in that case was that similar provincial legislation in pith and substance related to "money lending and money lenders" (Entry No. 27, List II of the Seventh Schedule) and that any argument based on the exclusion of promissory notes from the

(1) (1941) 73 C. L. J. 337 ; 45 C. W. N. 609 ; I. L. R. (1941-2) Calc. 107.
(2) [1940] F. C. R. 188 ; (1940) 73 C. L. J. 1.

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Spens, C. J.

sphere of provincial legislation would not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the provincial Act. On all material facts, these cases very closely resemble *Subrahmanyan Chettiar's* case (1) and if that decision is applicable here, these appeals must fail. Counsel for the appellant has accordingly attempted to distinguish that case with reference to certain differences in the provisions of the two provincial enactments. We have to decide whether these differences make any difference to the result.

The Bengal Money-lenders Act is, like the Madras enactment which was the subject-matter of *Subrahmanyan Chettiar's* case (1), part of a scheme to relieve agricultural indebtedness in the various Provinces of this country, but the enactments passed in the different Provinces have not all adopted the same lines. The Bengal Act begins with a comprehensive definition of the words "loan" and "lender", but excepts certain kinds of loans from the operation of the Act by taking them out of the definition. It makes detailed provisions for the registration and licensing of money-lenders and for the accounts to be maintained by them. The relief intended to be afforded by the Act is provided for in Chapters VI and VII. Chapter VI fixes maximum rates of interest recoverable on loans and the total amount recoverable for interest and principal in respect of any loan Chapter VII, of which section 36 forms part, provides for the reopening of settlements and of decrees of Courts in certain circumstances and for other ameliorative orders. The portion of the definition section relevant to the present case runs as follows :—

"Loan means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan, but does not include * * *

(e) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note."

Among the relieving provisions, the relevant clauses are sub-sections (1) and (2) of section 36. Sub-section (1) gives the Court power to reopen transactions "in any suit to which this Act applies" and by the definition clause this expression includes not only suits instituted after the first day of January, 1939, and suits pending on that date, but even suits already disposed of, unless proceedings in execution of decrees passed therein had also been completed by

(1) [1940] F. C. R. 188 ; (1940) 73 C. L. J. 1.

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that date. [See also proviso (ii) to section 36(1)]. Sub-section (2) of section 36 provides that if in the exercise of the powers conferred by sub-section (1) the Court reopens a decree, it shall " pass a new decree in accordance with the provisions of this Act ".

Comparing the above provisions of the Bengal Act with the corresponding provisions of the Madras Act, three points of difference were emphasised by Counsel for the appellant :—

(a) While the Madras Act contained no clear indication as to whether it was intended to affect promissory notes or not, the Bengal Act, by excluding promissory notes from exception (e) to the definition of loan, has clearly shown an intention to legislate in respect of promissory notes.

(b) While section 19 of the Madras Act was in terms limited to decrees passed before the commencement of the Act, the Bengal Act made provision by the same section for decrees passed before the commencement of the Act as well as decrees passed after the commencement of the Act.

(c) While section 19 of the Madras Act did not contemplate a *reopening* of the decree (but only its amendment), the Bengal Act expressly provided for the reopening of the decree and the passing of a new decree.

Stress was laid on these three points of distinction with particular reference to certain observations contained in the judgments in *Subrahmanyan Chettiar's* case (1).

Distinction (a) was represented as vital. It was contended that in *Subrahmanyan Chettiar's* case (1) the Court repelled the contention as to the total invalidity of the Act only on the ground that the general language of the Madras Act could, by the application of the principle of *Macleod's* case (2), be so read as not to comprehend promissory notes within its scope. Where, as in the present case, the Provincial Legislature has shown a deliberate intention to deal with promissory notes as well, it was contended that such legislation was an attempt to trespass upon the exclusive field of the Federal Legislature (Entry No. 28 of List I) and as such *ultra vires* the Provincial Legislature. It was also contended that as this provision was not an independent and severable provision, but part and parcel of the scheme of the Act worked out on the basis of the general definition of the term "loan", the doctrine of severability of the valid from the invalid provisions could not be

(1) [1940] F. C. R. 188 ; (1940) 73 C. L. J. 1.
(2) [1891] A. C. 455

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pressed in aid and that the whole enactment must therefore be held to be void. The Advocate-General of India and the Advocate-General of Bengal suggested by way of answer to this argument that the provisions of Bengal Money-lenders Act, even in their application to promissory notes, did not on their proper construction affect the rights of holders in due course under the Negotiable Instruments Act, but only the rights of the immediate parties to the instrument and that this was only a matter of "contract" (Entry No. 10 of List III of the Seventh Schedule). In support of this argument reliance was placed on sections 29 and 3(5) of the Bengal Act. The interpretation of these sections is not by any means free from difficulty and as there are other objections to be considered in connection with this line of argument, we prefer not to base our conclusion on it.

Assuming that the Bengal Act affects and was intended to affect rights and liabilities based on promissory notes, it does not seem to us necessarily to follow that the Act must be wholly void as *ultra vires* the Provincial Legislature. In *Subrahmanyan Chettiar's* case (1), this Court discussed at some length the applicability of the principles laid down by the Judicial Committee in the Canadian cases to the interpretation of the Indian Constitution Act. According to those cases, the mere fact that a provincial enactment may contain provisions bearing upon a subject exclusively reserved to the Dominion Legislature will not suffice to invalidate the provincial enactment. The other considerations which are relevant to this question have been adverted to in the judgments in *Subrahmanyan Chettiar's* case (1), but as the effect of the decision of the Judicial Committee has been summarised in Lefroy's Treatise on Canadian Constitutional Law, it would be convenient to quote from that Treatise. In section VIII (on page 80) the author observes that the absence of concurrent powers of legislation over certain subjects " must not be understood as meaning that if a given Act is *intra vires* of the Dominion Legislature, a precisely similar Act could under no circumstances be *intra vires* of a Provincial Legislature. For, as we shall see *(infra* page 98), subjects which in one aspect and for one purpose fall within the provincial powers of section 92 may in another aspect and for another purpose fall within section 91..... It seems quite possible that a particular Act, regarded from one

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aspect, might be *intra vires* of a Provincial Legislature and yet regarded from another aspect might be also *intra vires* of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act." As a foot-note to this statement, the author refers to certain early Canadian cases to show that an Act respecting bills of lading might be passed by a Provincial Legislature as a matter relating to property and civil rights, while the Dominion Parliament might pass a similar Act as a necessary or convenient matter to be dealt with in the regulation of trade and commerce. In section XIX (on page 95), he further observes: "Whatever powers the Provincial Legislatures have as included within the enumerated subject-matters of section 92 when properly understood, those powers they may exercise, although in so doing they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion Parliament under some subject-matter enumerated in section 91." In section XXI (on page 98), the author refers again to the distinction founded on difference in aspects of legislation and observes: "The cases which illustrate this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon." Judged by these tests, the Bengal Money-lenders Act must, taken as a whole, be held to fall within the description, legislation in respect of "money lending and money lenders", a subject within the exclusive competence of the Provincial Legislature (Entry No. 27 in List II). As pointed out in *Subrahmanyan Chettiar's* case (1) the fact that among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

The further question may no doubt still arise as to what is to happen in the event of a conflict between provisions contained in a provincial enactment so far as they bear upon promissory notes and provisions relating thereto contained in a Central enactment. Certain aspects of this question have been adverted to in *Subrahmanyan Chettiar's* case (1) and the difficulty of applying section 107 of the Constitution Act to solve the conflict, so far as such conflict may arise out of Central legislation bearing on List I subjects, but

(1) [1940] F. C. R. 188; (1949) 73 C. L. J. 1.

passed before 1935, has also been pointed out. Even if, as suggested by Sulaiman, J. in that case, it should be held that such conflict should be resolved by an extension of the principle of section 107 by analogy or by the application of the Canadian doctrine of the "occupied field", that would not help the appellant in the present cases. That line of argument would not support the plea of *ultra vires*, but would only bring in the principal of repugnancy, that is, in the event of and in so far as there is a conflict between Provincial Legislation and Central Legislation, the latter shall prevail. In the present cases we are not concerned with the rights of parties under a promissory note. Here, as in *Subrahmanyan Chettiar's* case (1), their rights and liabilities had merged in decrees even before the passing of the Bengal Money lenders Act, and, subject to the observations to be made when dealing with points (b) and (c), the principle of that decision is equally applicable.

In this view, it is not necessary to refer at length to the arguments urged or authorities cited on the question of the severability of the invalid provisions of an Act from the valid provisions. The question will be material only if the Act is in some measure held to be *ultra vires* the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a Central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. Language has sometimes been employed in enunciating the doctrine of "occupied field" which may seem to suggest that in respect of a field occupied by Central legislation, the Provincial Legislature would have no *power* at all to deal with the subject. But having considered all the decisions bearing on that question, in our judgment it is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied in this class of cases.

Distinction (b)—as to the wide terms of the Bengal Act covering both decrees passed before the Act and decrees passed after the Act—was emphasised in view of an observation in *Subrahmanyan Chettiar's* case (1). It was there said that it might be necessary to draw a distinction between decrees passed on promissory notes before the commencement of the Act and decrees passed after the commencement of the Act, because in the latter case the Act might in substance interfere with rights which, at or after the

(1) [1940] F. C. R. 188; (1940) 73 C. L. J. 1.

F. C.

1943.

The Bank of Commerce Ltd. Khulna v. Amulya Krishna Basu Roy Choudhury.

Spens, C. J.

date of its commencement, were only rights under promissory notes. This question, again, might assume some importance if the existence of provisions relating to promissory notes would have the effect of rendering the provincial enactment invalid. If however the operation of such provisions is only to be determined by the application of the doctrine of repugnancy, the circumstance that one and the same section provides for both kinds of decrees cannot affect the decision of the present cases, where admittedly the decrees had been passed before the Act came into operation.

Distinction (c) does not, in our opinion, amount to more than a verbal distinction. We do not understand section 36 (2) (a) as relegating the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was passed.

We are accordingly of the opinion that these points of difference between the Bengal Act and the Madras Act do not warrant the conclusion that the present case differs in any essential respects from *Subrahmanyan Chettiar's* case (1). The appeals accordingly fail and are dismissed with costs (Counsel's fee only in one case). According to the usual practice, there will be no order as to costs in favour of the Advocate-General of Bengal who intervened.

A. T. M. *Appeals dismissed.*

(1) [1940] F. C. R. 188 ; (1940) 73 C. L. J. 1.

APPELLATE CIVIL

Before Mr. Justice A. S. M. Akram, and Mr. Justice A. L. Blank.

MAHARAJ BAHADUR SINGH
IN PLACE OF
K. C. MUKHERJEE,
RECEIVER OF THE ESTATE OF
MAHARAJ BAHADUR SINGH

v.

RAJA BHUPENDRA NARAYAN SINGH BAHADUR AND OTHERS.*

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January, 8, 9, 10, 12, 15, 16, 17, 22, 23, 24, 25, 30, 31. February, 1, 23.

Mesne profits—Equitable set off—Constructive trust—Resumed Chaukidari chakran land—Zemindar and patnidar—Ascertainment of fair and equitable rent—Principle applicable—Remand order—No appeal preferred.

Suits were instituted by the predecessors-in-interest of the appellants as patnidars to the extent of eight annas share and darpatnidars to the extent of the remaining eight annas share against the defendant No. 1 (zemindar) and his tenants for the recovery of Khas possession of certain resumed chaukidari chakran lands and for mesne profits. The suits ended in favour of the plaintiffs and decrees were made on 23rd September, 1910 to the effect that the plaintiffs would get Khas possession on condition of paying additional rent and would have mesne profits till the date of delivery of possession. These decrees were confirmed by the District Judge on appeal who remanded the cases for determining the terms and conditions under which the suit lands were to be held by the plaintiffs and for the ascertainment of mesne profits. The decrees were—" plaintiffs' title was declared to the suit lands and they were to get khas possession of the same by ejecting the tenant defendants on condition of paying the defendant No 1 (the zemindar) an additional rent to be determined on the principle that the original putni rent should bear the same ratio to the patni rent now payable by the plaintiffs as the original Hustabud at the time of the creation of the patni should bear to the present increased Hustabud or any other fair and equitable rent which may be determined at the time of assessing the mesne profits. These decrees were reversed by the High Court but affirmed by Privy Council on the 7th July, 1925.

The plaintiffs got delivery of possession on 23rd November, 1910.

On the 8th December, 1922, the plaintiffs filed applications for the ascer-

* Appeals from Appellate Decrees Nos 850 to 885 of 1939, against the decrees of B. K. Guha Esq., District Judge of Birbhum at Suri, modifying the decrees of Nagendra Nath Mukherjee Esq., Munsiff, 1st Court, Rampurhat, dated the 31st March, 1938 and reversing the decrees of Moulvi Syed Alla Rafez, Munsiff, 2nd Court, Rampurhat, dated the 22nd December, 1937.

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tainment of mesne profits and on 28th May, 1927, the defendant No. 1 (zemindar) filed objections claiming set-off for rent due. On 18th December, 1937, the Munsiff delivered judgment awarding the plaintiffs a total sum of ..... as mesne profits for the period from 22nd December, 1906 to 23rd November, 1910, after giving a set-off for certain items out of the claims put forward by defendant No. 1.

On appeal, the learned District Judge on 16th December, 1938, modified the decision of the Munsiff by allowing equitable set-off (a) for rents due to defendant No. 1 and revenue and cesses paid, subsequent to the date of delivery of possession to the plaintiffs (that is from 23rd November, 1910 till 28th May, 1927); (b) for full rents due prior to the period of Wasilat in connection with the realisation of arrears relating to two mouzahs (i. e. from 1903 to 1909) and for revenue and cesses paid; (c) by not giving credit for the arrears not realised from tenants during the Wasilat period; (d) by allowing rent to defendant No. 1 on the basis of certain decision and not on the annual assets of the land determined by the Collector and by reducing the rate of interest during the period of Wasilat from 12 per cent. to 6 per cent. per annum:

Held, that the equitable set-off could not be claimed by the zemindar (defendant No. 1). The decrees in the original suits did not create the claims; they were merely declaratory decrees. The fixing of rent was not a condition precedent to the patnidars being put in possession and the zemindar (defendant No. 1) was not entitled to an equitable set-off for the rents, revenue and cess for the period subsequent to the date of delivery of possession to the plaintiffs as also for rent, revenue and cesses prior to the period of Wasilat.

Apcar Collieries Ltd. v. *Raja Jyoti Prasad Sing* (1) dissented from.

No constructive trust for the rent that was to fall due to the zemindar (defendant No. 1) could come into existence by the decree which merely provided for khas possession subject to the liability for rent. No cause of action for rent could have arisen at the time of the filing of the plaint or the written statement in these suits, and hence the two claims were quite different and uncertain in nature, subject-matter and circumstances.

That the amount of rent payable by the patnidar should not be made to depend solely upon the circumstances of the point of time chosen by the zemindar or by the patnidar to bring their respective suits for ascertainment of rent or for khas possession. No evidence was adduced to show what was the gross collection at the time of the creation of the original patni in 1852. Hence the fair rent was to be assessed on the basis of annual value of the land determined by the Collector at the time of resumption in 1899 as laid down in *Radha Charan* v. *Maharaja Ranjit Singh* (2).

That the claim for set-off on the ground of Munafa during the Wasilat period, viz., 1901-1913 was disallowed on the ground that the claim was put forward by the zemindar (defendant No. 1) long after the decree was made, the plaintiffs not being in possession during that period, that the plaintiffs' liability was a joint liability with the other co-sharer patnidars, who were

(1) (1931) 35 C. W. N. 597.
(2) (1917) 27 C. L. J. 532.

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not made parties in the Court of appeal below and that the nature and subject matter of the claim were entirely different and were such as could not have been entertained in a Court of equity.

Hari Ananda Shaha v. *Mohummad Esahak* (1); *Rawson* v. *Samuel* (2) and *Maw* v. *Ulyatt* (3) followed.

Where the whole suit was not disposed of upon any preliminary point, the trial Court decided the several issues on their merits and except for one issue in respect of which the lower appellate Court remanded the case:

Held, that neither in form nor in substance the order could be treated as one made under order 41 rule 23 of the Code of Civil Procedure or purporting to be made under it, though irregularly made; that such order being made under the inherent power of Court, could be attacked in appeal from decree.

Radha Krishna Rao v. *Venkata Rao* (4) and other cases distinguished.

Appeals the by Plaintiffs.

Applications for the ascertainment and recovery of mesne profits.

Other facts appear from the judgment.

Mr. Urukram Das Chakravarty for the Appellants in Appeals Nos. 823 and 879 to 885.

Messrs. Panchanan Ghose, Paresh Nath Mukherjee (Jr.) and *Chandra Nath Mukherjee* for the Appellants in Nos. 851 to 878.

Mr. Sita Ram Banerjee (for Mr. Prakash Chandra Bhose) for the Respondents in all the Appeals.

Messrs. Arun Kumar Dutta and *Amiya Kumar Mukherjee* for the Respondents in Appeals Nos. 823 and 851.

Mr. Upendra Kumar Roy for the Deputy Registrar in Appeal No. 872.

C. A. V.

The following judgments were delivered:

S. A. Nos. 861 to 885 of 1939.

February, 23.

Akram, J.:—These 25 Special Appeals by the plaintiffs arise out of as many final decrees made in connection with applications for the ascertainment and recovery of mesne profits. It would be convenient here to deal with these appeals in 3 separate groups as was done in the Courts below.

(1) (1936) 40 C. W. N. 751.
(2) (1839) 54 R. R. 259.
(3) (1861) 31 L. J. (Ch.) 33.
(4) (1924) I. L. R. 48 Mad. 713.

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GROUP I.—Appeals.

1. S. A. 878 of 39—T. A. 38 of 38 arising out of T. S. 997 of 1909.
2. S. A. 862 of 39—T. S. 32 of 38 arising out of T. S. 998 of 1909.
3. S. A. 863 of 39—T. S. 30 of 38 arising out of T. S. 999 of 1909.
4. S. A. 866 of 39—T. A. 35 of 38 arising out of T. S. 1000 of 1909.
5. S. A. 873 of 39—T. A. 31 of 38 arising out of T. S. 1001 of 1909.
6. S. A. 871 of 39—T. A. 34 of 38 arising out of T. S. 1002 of 1909.
7. S. A. 876 of 39—T. A. 36 of 38 arising out of T. S. 1003 of 1909.
8. S. A. 868 of 39—T. A. 37 of 38 arising out of T. S. 1004 of 1909.
9. S. A. 864 of 39—T. A. 42 of 38 arising out of T. S. 1005 of 1909.
10. S. A. 875 of 39—T. A. 37 of 38 arising out of T. S. 1006 of 1909.
11. S. A 865 of 39—T. A. 36 of 38 arising out of T. S. 1007 of 1909.
12. S. A. 869 of 39—T. A. 41 of 38 arising out of T. S. 1008 of 1909.
13. S. A. 877 of 39—T. A. 45 of 38 arising out of T. S. 1009 of 1909.
14. S. A. 872 of 39—T. A. 40 of 38 arising out of T. S. 1010 of 1909.
15. S. A. 867 of 39—T. A. 44 of 38 arising out of T. S. 1011 of 1909.
16. S. A. 874 of 39—T. A. 39 of 38 arising out of T. S. 1012 of 1909.
17. S. A. 870 of 39—T. A. 43 of 38 arising out of T. S. 1013 of 1909.
18. S. A. 861 of 39—T. A. 33 of 38 arising out of T. S. 1014 of 1909.

GROUP II—Appeals.

1. S. A. 879 of 39—T. A. 23 of 38 arising out of T. S. 1483 of 1904.

GROUP III—Appeals.

1. S. A. 880 of 39—T. A. 24 of 38 arising out of T. S. 459 of 1904.

2. S. A. 881 of 39—T. A. 25 of 38 arising out of T. S. 461 of 1904.

3. S. A. 882 of 39—T. A. 26 of 38 arising out of T. S. 460 of 1904.

4. S. A. 883 of 39—T. A. 27 of 38 arising out of T. S. 456 of 1904.

5. S. A. 884 of 39—T. A. 28 of 38 arising out of T. S. 458 of 1904.

6. S. A. 885 of 39—T. A. 28 of 38 arising out of T. S. 457 of 1904.

The facts in detail are set out in the judgment of the Court below and it is not necessary to repeat them here over again; it will be sufficient for the purpose of the present appeals to state that in Group I appeals eighteen suits (T. S. Nos. 997 to 1014 of 1909) were instituted by Ganpat Singh and Narpat Singh predecessors-in-interest of the appellants, as patnidars to the extent of 8 annas share and darpatnidars to the extent of the remaining 8 annas share, against the defendant No. 1 zemindar and his tenants, for the recovery of khas possession of certain resumed chaukidari chakran lands and for mesne profits. These suits ended in favour of the plaintiffs and decrees were made by the learned Munsiff in September 1910 to the effect that the plaintiffs would get khas possession on condition of paying additional rent and would have mesne profits till the date of delivery of possession; shortly thereafter on 23rd November, 1910 the plaintiffs took delivery of possession; against the decision aforesaid given by the Munsiff the defendant No. 1 appealed before the District Judge while the plaintiffs filed cross appeals but both were dismissed and the case was remanded to the Munsiff for determining the terms and conditions under which the suit lands were to be held by the plaintiffs and for the ascertainment of mesne profits; the plaintiffs thereupon appealed to the High Court and on 27th February, 1922 the High Court set aside that part of the judgments of the Courts below which awarded additional rent to the defendant No. 1: *Zemindar, Narpat Singh* v. *Raja Bhupendra Narain Singh* (1); the defendant, then preferred appeal before His Majesty in Council and on 7th July, 1925 succeeded in getting restored the judgment

(1) (1922) 26 C. W. N. 943.

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passed by the District Judge : *Raja Bhupendra Narayan Singh* v. *Narapat Singh* (1). Meanwhile on 8th December, 1922 the plaintiffs filed applications for the ascertainment of mesne profits and on 28th May, 1927, the defendant No. 1 filed objection claiming set off for rents due. The proceedings thereafter had a chequered career which terminated on 18th December, 1937 when judgment was delivered by the Munsiff awarding the plaintiffs a total sum of Rs. 7806-4-6 as mesne profits (for the period 22nd December 1906 till 23rd November 1910) after giving a set off for certain items out of the claim put forward by the defendant No. 1.

Against that decision the defendant No. 1 preferred appeals before the District Judge of Birbhoom ; the learned Judge by his judgment dated 16th December, 1938 modified the decision of the Munsiff (a) by allowing epuitable set off (i) for rents due to the defendant No. 1 and revenue and cesses paid, subsequent to the date of the delivery of possession to the plaintiff (i. e. from 23rd September 1910 till the 28th May, 1927) (ii) for full rents due prior to the period of Wasilat in connection with the realisation of arrears relating to mouzas Sitalgram and Bandhkhola (i. e. 1903 to 1906) and for revenue and cesses paid,

(b) by not giving credit for the arrears not realised from tenants during the Wasilat period,

(c) by allowing rent to the defendant No. 1 on the basis of decision in Rent Appeals Nos. 43 to 52 and 58 of 1938 and not on annual assets of the land determined by the Collector as laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (2),

(d) by reducing the rate of interest during the period of Wasilat from 12 per cent. per annum to 6 per cent. per annum.

It is against this decision of the learned District Judge that the plaintiffs preferred the present appeals.

It is contended by the learned Advocate for the appellants,

1. that the learned District Judge was in error in holding that the defendant No. 1 was entitled to an equitable set off for the rents, revenue and cess for the period subsequent to the date of delivery of possession to the plaintiffs as also for rents, revenue and cess prior to the period oi Wasilat, inasmuch as :—

(a) no claim for a set off was made in the written statement and there were no dues in existence either at the time of filing the

(1) (1925) 42 C. L. J. 227 ; 30 C. W. N. 553.
(2) (1917) 27 C. L. J. 532.

plaint or the written statement but the dues arose subsequently and thus could not be taken into consideration: *Richards* v. *James* (1).

(b) the two claims were entirely different and did not arise out of one and the same transaction—one was for compensation against a trespasser while the other was for rent for a different period against a tenant: *Fakir Chandra Dutta* v. *Messrs. Gisborne & Co.* (2); *Maw* v. *Ulyatt* (3) besides they were not against the same persons—the liability for compensation was of the defendant No. 1 while the liability for rent was of the plaintiff and *other co-sharers*, who were not parties to the appeal in the Court below; *i. e.*, there were no mutual debts due in the same rights; *Middleton* v. *Pollock* (4); *Arnold* v. *Bainbrigge* (5) and *Hari Ananda Shaha* v. *Mohummad Esahak* (6).

(c) the major portion of the defendant's claim (i. e. prior to 1924) was barred by the rule of Limitation and could not be brought within the exception to the rule, there being no position of trust or confidence between the parties or any intimate connection between the claims: *R. M. M. S. T. Vyravan Chetty* v. *Srimath Deivasikamani* (7) and *Stephen Clark* v. *Ruthnavaioo Chetty* (8).

(d) in the suit itself (1909-1925) no claim for a set off being made the Privy Council decree of 1925 could not be reoponed in the present proceedings.

(e) Some of the claim by the defendant and at all events the total claim by him exceeded the pecuniary jurisdiction of the Munsiff's Court and as such was beyond its competence:

Brojendra Nath Das v. *The Budge-Budge Jute Mill Co.* (9).

Reference in this connection was also made to order 20 rule 19 and order 8 rule 6 of the Civil Procedure Code.

II. The rent should have been calculated on the annual assets of the land according to the principles laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (10) and not on fair and equitable basis as settled in R. Appeals 43 to 52 and 58 of 1 38.

(1) (1848) 17 L. J. (Ex. Ch.) 277.
(2) (1903) 8 C. W. N. 174;
(3) (1861) 31 L. J. (Ch.) 33.
(4) (1875) 20 Eq. 29.
(5) (1853) 156 Eng. Rep. (Ex) 66
(6) (1936) 40 C. W. N. 751.
(7) (1915) I. L. R. 39 Mad. 939.
(8) (1864) 2 Mad. H. C. Reports 296.
(9) (1893) I. L. R 20 Calc. 527.
(10) (1917) 27 C. L. J. 532.

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III. That the Court below was in error in not allowing credit on account of rent not realised by the defendant during the wasilat period in the absence of any satisfactory explanation by him why the dues could not be collected.

IV. That interest should not have been reduced from 12 to 6 per cent. till the delivery of possession, the matter being *finally* decided on a previous occasion by the Munsiff at the time of giving directions to the Commissioner in connection with the ascertainment of mesne profits (i. e. on 23rd May, 1929) and there being no appeal preferred from his decision.

It is argued on the other hand by the learned Advocate for the defendant respondent that regarding contention No. 1 it should be noticed that the suits were decreed conditionally viz. the plaintiffs' title was declared to the suit lands and they were to get "khas possession of the same by ejecting the tenant defendants on *condition of paying the defendant No. 1 an additional rent* to be determined on the principle that the original patni rent should bear the same ratio to the patni rent now payable by the plaintiffs as the original Hustabud at the time of the creation of the patni should bear to the present increased Hustabud or *any other fair and equitable rent which may be determined at the time of assessing the mesne profits*", it is urged that the condition (payment of rent) was a "condition precedent" to getting possession as explained in the case of *Apcar Collieries Ltd.* v. *Raja Jyoti Prasad Sing* (1) and this fact constituted the plaintiffs constructive trustees in respect of the rents payable to the defendant—rights and obligations thus arose simultaneously under the same decree which was the one transaction out of which the two claims arose; in any event it is said they are so closely connected together that it would not be fair to drive the defendant to a separate and independent suit for realising his dues; *Sheo Saran Singh* v. *Mohabir Pershad* (2), besides equity in India, it is pointed out has a much wider scope than under the English law: *Niaz Gul Khan* v. *Durga Prasad* (3); *Bank of Dacca Ltd.* v. *Gouri Gopal* (4). In the circumstances it is said that the parties were merely accountable to each other and no rule of limitation could come in and bar a fair adjustment of the claims, the remedy may become barred but the right is not extinguished; *Gajadar Mahto* v. *Raghubar Gope* (5); *Narendra Lal*

(1) (1931) 35 C. W. N. 597.
(2) (1905) I. L. R. 32 Calc. 575; 2 C. L. J. 73.
(3) (1892) I. L. R. 15 All. 9;
(4) (1936) A. I. R. Calc. 409.
(5) (1907) 12 C. W. N. 60.

Khan v. *Tarubala Dasi* (1); *Edward Dalgliesh* v. *Ramdin Singh* (2).

As regards the absence of pecuniary jurisdiction in respect of the claim it is pointed out that no such objection was taken before the Munsiff; that merely the claim of the plaintiffs was wiped off but no decree made for any balance outstanding in favour of the defendant; that it would work extreme hardship upon the defendant to relegate him to another suit in another Court for his just dues in the circumstances.

As regards the basis of calculation of rent (contention No. II) it is said that it should be on the basis determined in the Rent Appeals themselves and not on the basis laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (3).

As regards rent not realised and reduction of interest to 6 per cent. per annum during the wasilat period (contentions III and IV) the learned Advocate for the respondent adopts the reasons set out in the judgment of the Court below and submits that there has been no error of law committed by the learned Judge in arriving at his conclusions and his decision therefore ought to be maintained in respect of those matters.

The contention No. I put forward by the learned Advocate for the appellants as regards the question of equitable set off for the period prior to 1906 in connection with the realisation of back rents as also for the period subsequent to the delivery of possession to the plaintiffs seems to me to be well founded.

I am not much impressed with the argument of the learned Advocate for the respondent in this connection. In my opinion the decree in the original suit *did not create* the claims, it was merely a declaratory decree: the observations in the case of *Apcar Collieries Ltd.* v. *Raja Jyoti Prasad Sing* (4) that their Lordships of the Judicial Committee in the case of *Bhupendra Narayan Singh* v. *Narpat Singh* (5) held that the fixing of rent was a "condition precedent" to the patnidar being put in possession, to which our attention has been drawn, was it seems to me, not necessary for the decision; the Privy Council case itself to which reference has been made in the case of *Apcar Collieries Ltd.* v. *Raja Jyoti Prasad Singh* (4) does not lay down the fixing of rent as a condition

(1) (1920) I. L. R. 48 Calc. 817 (823).
(2) (1909) 14 C. W. N. 170.
(3) (1917) 27 C. L. J. 532.
(4) (1931) 35 C. W. N. 597.
(5) (1925) L. R. 52 I. A. 355; 42 C. L. J. 227.

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precedent. The only question in the appeal before their Lordships of the Judicial Committee in the case of *Bhupendra Narayan Singh* v. *Narpat Singh* (1), being whether or not the zemindar was entitled to increased rent on account of the resumed Chowkidari Chakran lands, their Lordships in the course of their judgment observed as follows :—" Their Lordships, therefore, see no reason for interfering with the long series of authorities commencing as far back as the year 1900, which have established the right of the zemindar to have an additional rent fixed for such lands, nor can their Lordships overlook the fact that in the cases already referred to before this Board no exception was taken by the patnidar to the fixing of such rents as a condition of being put into possession." The observation seems to me merely to imply that possession in those cases which was to be given to the patnidar, only on his agreeing to pay rent was not challenged by the patnidar. The patnidar was not bound to take settlement if he did not wish to.

I am unable in the circumstances to accede to the respondent's contention.

No constructive trust for the rent that was to fall due to the defendant can be said to have come into existence by the decree, the decree merely provided for khas possession subject to the liability for rent which the plaintiffs strenuously denied. No rent could be due till possession of the suit lands was obtained, and even then the liability would be not of the plaintiffs alone, but of the plaintiffs and their co-sharers ; obviously no cause of action for rent could have arisen at the time of the filing of the plaint or the written statement in these suits. The two claims therefore seem to me to be quite different and unconnected in nature, subject-matter and circumstances.

For the aforesaid reasons I am of opinion that the Court of appeal below ought not to have allowed the equitable set off claimed by the defendant.

I would accordingly set aside this part of the decision of the Court below and restore that of the learned Munsiff.

It is to be noticed that so far as the wasilat period is concerned (1906 to 1910) there has been no appeal by the plaintiffs before the lower appellate Court and consequently the decision of the learned Munsiff relating to this period stands unchallenged.

As to contention No. II the only question is what should be

(1) (1925) L. R. 52 I. A. 355 ; 42 C. L. J. 227.

the basis on which the rent is to be assessed. This matter however has been dealt with by us in the Rent Appeals Nos. 851 to 860 and 823 of 1939 where we have set aside the decision of the learned District Judge and restored that of the learned Munsiff who had adopted the principle laid down in the case of *Radha Charan* v. *Maharaja Rnajit Singh* (1) as the true basis.

In the circumstances I would set aside the judgment and decree of the learned District Judge in this respect also and restore those of the learned Munsiff.

As to contention III the learned Judge in the course of his judgment has remarked " The broad fact that we are dealing with transactions dating as far back as 1313 to 1317 B. S. should not be lost sight of. After this lapse of time it would be unreasonable to expect the landlord to be able to offer satisfactory explanation why rent was not realised in a few instances. Persons who were in the best position to offer an explanation are dead. The Maharaja is dead and so are many of his officers. Some of the Karchas have also been eaten up by white ants while those papers were in the custody of the Court thereby imposing an additional handicap on the appellant. Moreover the items of non-realisation are only a few and in view of all these circumstances I am unable to agree with the learned Court below that the plaintiffs should be entitled to get those arrears of rent which were not shown to be collected. It may also be observed that the plaintiffs have not adduced any evidence to show that the non-realisations in question were in any way due to the negligence of Maharaja Ranjit Singh. On the contrary, the records themselves bear eloquent testimony to the remarkable vigilance of the Maharaja and that alone is a sufficient guarantee that nothing was left undone to realise the dues from the tenants. "

In view of the above remarks I do not think I should interfere with the decision of the learned Judge regarding this matter.

As to contention No. IV. It is to be observed that the order dated 23rd May, 1929 passed by the Munsiff could not be treated as a decree, that in fact certain appeals from such orders relating to directions given to the Pleader Commissioner were dismissed on the ground that no appeal lay. It seems to me that the order mentioned above was merely in the nature of interlocutory order and as such could be reopened in an appeal from the decree itself: *E. Dalgliesh* v. *Nandan Misser* (2); the learned District Judge

(1) '1917) 27 C. L. J. 532.
(2) (1911) 13 I. C. 186.

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could therefore enter into the question of the rate of interest ; on a consideration of the facts and circumstances of the case he has observed as follows :—

" In view of all the circumstances I am of opinion that the Nashipur Raj cannot be considered to be an ordinary trespasser who takes possession forcibly or dishonestly of another person's lands without any colour or semblance of right or title : On this ground alone, if not anything else, the claim of the plaintiffs for interest at 12 per cent. should be ruled out. "

" The impression that I have formed, however, on going through the various orders and multifarious petitions is that the plaintiffs were more blameworthy than the defendant in the matter. It must also not be forgotten, however, that it was the plaintiffs who were entitled to get mesne profits and it was, therefore, all the more their duty to expedite the proceedings. The question of apportionment as between the different parties of the responsibility for the delay has some bearing on the determination of the question of costs and interest as well as on the question of equitable set-off which has been claimed by the defendant. "

In the circumstances therefore I am of opinion that the reduction of interest to 6 per cent. per annum during the wasilat period was fully justified and should not be interfered with in Second Appeal.

In the result I would modify the judgment of the lower appellate Court in appeals in this Group and restore that of the trial Court with the following variations:

(a) Credit should not be allowed to the plaintiffs for rent not realised during the wasilat period.

(b) Interest should be reduced to 6 per cent. per annum during the wasilat period.

In Group II, there is only one appeal ; the original suit T. S. 1483 of 1904 was instituted by Maharaj Bahadur Singh Patnidar in 8 anna interest and Darpatnidar in the remaining 8 anna interest and was decreed in August 1905 by the Munsiff ; there was an appeal by the defendant before the District Judge but it was dismissed in February 1906 and on a Second Appeal to the High Court the case was sent back to the trial Court on a point of limitation. The Munsiff decreed the suit again on the 25th May, 1908 but on appeal before the District Judge the suits were dismissed ; the matter again came up before the High Court and their Lordships (Chitty and Teunon, JJ.) affirmed the Munsiff's decision on 5th March, 1913 holding that the period of limitation

was 12 years and not 3 years ; shortly thereafter, in August, 1913, the plaintiff took delivery of possession. From the High Court decision, however, an appeal was taken before the Privy Council by the defendant but on 30th May, 1918 the appeal was dismissed ; the plaintiff then on the 6th November, 1918 applied for the ascertainment of mesne profits but the application was returned by the Munsiff on the ground of want of pecuniary jurisdiction. Thereupon it was taken before the Subordinate Judge. Later on however it was got back and again filed before the Munsiff on 18th December, 1926 on the strength of the Full Bench decision in the case of *Bidyadhar Bachar v. Manindra Nath Das* (1). The Munsiff allowed mesne profits amounting to Rs. 7736-6 9 on 18th December, 1937 for the period (1901-1913) ; the defendant then appealed before the District Judge while the plaintiff filed cross appeal ; the learned District Judge modified the decision of the Munsiff reducing the amount to Rs. 972-10-0 and odd pies (i) by allowing equitable set off subsequent to the date of delivery of possession (i. e. from 1913 till 1923) (ii) by excluding arrears of rent not shown to have been collected, (iii) by giving rent on fair and equitable basis as determined in Rent Appeal No. 58 of 1938 (iv) by reducing the rate of interest during the wasilat period. Against that decision the plaintiff has preferred the present appeal.

No question in this appeal arises in respect of any equitable set off in connection with any arrears or back rents realised during the wasilat period and but for the question of rent (munafa) during the wasilat period which the learned Advocate for the appellant urges can be raised before us and there was a cross appeal in this case by the plaintiff unlike the cases under Group I the rest of the questions are common to the Group I appeals and the same arguments have been advanced in support of them, the same consideration therefore apply and my decision in Appeals from Group I will govern those matters in this group as well.

As to the additional ground regarding Munafa during the wasilat period, the learned Judge in the Court of appeal below has remarked :—" A cross appeal was preferred by the respondent. Various points were raised in the original memorandum of cross appeal. At the time of hearing, however, practically all of them were given up. It was urged, however, that the landlord defendant was not entitled to any deductions on account of collection charge on the ground that he was a mala fide trespasser and in this

(1) (1925) 42 C. L. J. 49 ; 29 C.W. N. 869 ; I. L. R. 53 Calc. 14.

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connection reference was made to *Mugun* v. *Surbessur* (1); *Altaf Ali* v. *Lalji Mal* (2) and *Raja Sashikanta* v. *Raja Sarat Chandra* (3). This contention cannot, however, be upheld as I have shown elsewhere."

"Incidentally it may be observed that if I were to uphold the contention of the learned pleader for the respondent on this point, the respondent would have to pay a much higher amount of court-fees on the memorandum of cross appeal. He has declined to do so."

In view of the above observation and having regard to the protracted nature of this litigation (the suit was in 1904) I am not disposed to allow the appellant to raise the point afresh, besides the plaintiffs' Advocate has not been able to inform me what amount was given as Munafa during the wasilat period. In any event it cannot be a large sum and I do not think I shall be justified in sending back the case again to the Munsiff for determining this amount. The result is that the judgment and decree of the learned Munsiff will be restored with the modifications indicated in the appeals in Group I in respect of arrears not shown to have been collected and the rate of interest during the wasilat period.

In Group III there are six appeals: Suits were filed by Maharaja Bahadur Singh (Patnidar in 8 anna interest and Darpatnidar in the remaining 8 anna interest) before the Munsiff on the 20th September, 1904 for khas possession and mesne profits, they were decreed on the 7th August, 1905 and appeals therefrom by the defendant were dismissed by the District Judge on the 17th February 1906; appeal was then preferred before the High Court. The High Court held that 3 years' limitation applied and remanded the suits to the Munsiff; the Munsiff dismissed the suits on 1st September, 1908; the plaintiff then appealed before the District Judge but was unsuccessful. He therefore appealed before the High Court and on the 5th March, 1913 the High Court decreed the appeals. Shortly thereafter the plaintiff took delivery of possession of the suit lands in August, 1913. Meanwhile the defendant preferred appeal to the Judicial Committee of the Privy Council against the High Court decision but the appeal was dismissed in May 1918, *Maharajah Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (4)

(1) (1867) 8 W. R. 479.
(2) (1877) I. L. R. 1 All. 518.
(3) (1921) 34 C. L. J. 415.
(4) (1918) 29 C. L. J. 193; 23 C. W. N. 198; I. L. R. 46 Calc. 178

Application for mesne profits was thereafter made on the 6th November 1918. The defendant No. 1 filed objection on the 15th July, 1922, claiming that his rent (Munafa) should be settled first.

In the case of *Narpat Singh* v. *Bhupendra Narayan Singh* (1) however it was held by the High Court that the defendant was not entitled to Munafa and this decision came to be reversed by the Judicial Committee only on the 7th July 1925—*Raja Bhupendra Narayan Singh* v. *Narapat Singh* (2). Accordingly there was much delay in the proceedings for ascertainment of mesne profits and it was on the 18th December, 1916 that a pleader Commissioner was appointed by the Munsiff and directions were given to him on 23rd September, 1927 as to the manner in which calculations were to be made for ascertaining mesne profits. The Commissioner submitted his report on the 18th January, 1928 and the proceedings then came to a close on the 18th December, 1937 when the Munsiff gave his decision.

From this decision the defendant appealed before the District Judge and the plaintiffs filed cross appeals; the learned Judge by judgment dated 16th December, 1938 modified the decision of the Munsiff; it is against that decision that the plaintiffs have preferred the present appeal.

In these appeals similar contentions have been raised as in Group I appeals, as regards (i) equitable set off for the dues subsequent to the date of possession (ii) arrears not collected for which no explanation was forthcoming (iii) reduction of the rate of interest during the wasilat period. As to these matters my decision in Group I cases will govern them. The only other point urged is that the learned Judge ought not to have allowed to the defendant Munafa during the wasilat period (i. e. 1901-1903).

As to this it is to be observed that the claim was put forward by the defendant long after the decree was made; that the plaintiffs not being in possession during that period could not be made liable for rent and that in any event their liability was a *joint liability* along with the other 8 anna co-sharer patnidars who were not impleaded in the Court of appeal below—the nature and the subject-matter of the two claims are also entirely different and in my opinion are such as could not have been entertained in a Court

(1) (1922) 26 C. W. N. 943.
(2) (1925) 42 C. L. J. 227; 30 C. W. N. 553.

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of equity for allowing a set off ; *Hari Ananda Shaha* v. *Mohummad Esahak* (1) ; *Rawson* v. *Samuel* (2) ; *Maw* v. *Ulyatt* (3).

I would accordingly reverse the decision of the learned District Judge in this respect and restore that of the learned Munsiff. So that in this Group also the judgment of the learned Munsiff would be restored with the variations indicated in the Group I appeals in respect of arrears not collected during wasilat period and rate of interest.

The result therefore is that all these twenty-five appeals are decreed in part.

In the circumstances of the case I would make no order for costs in the appeals.

Blank, J. :—I agree.

S. A. Nos. 851 to 860 of 1939.

These ten Second Appeals by the defendant (patnidar to the extent of 8 annas share and darpatnidar to the extent of the remaining 8 annas share) arise out of Suits Nos. 1102 to 1106 of 1932 and 18 to 22 of 1937 instituted by the plaintiff zemindar for the assessment of fair rents and for the recovery of arrears at the assessed rates, in respect of chowkidari chakran lands transferred to him under Bengal Act VI of 1870. These suits with some other suits (viz. $\frac{23 \text{ of } 1937}{1126 \text{ of } 1936}$; 1815 of 1928 ; 1098 of 1932) were tried together by the Munsiff and the following issues were framed :—

1. Are the Suits Nos. 1815 of 1928 and 1098 of 1932 bad for defect of parties ?

2. What should be the fair and equitable rents in these suits ?

3. Is the defendant Golap Kumari Bibi liable for rents of these suits ?

4. Is the plaintiff entitled to cess and damages or to a decree for more than 3 years in any of these suits ?

5. What relief if any is the plaintiff entitled to ?

The learned Munsiff decided all those issues, and on 4th March, 1937 dismissed Suits Nos. 1815 of 1928 and 1098 of 1932 as bad for defect of parties but decreed the other suits in part, assessing rent on the principle laid down in the case of

(1) (1936) 40 C. W. N. 751.
(2) (1839) 54 Revised Reports 259.
(3) (1861) 31 L. J. (Ch.) 33.

Radha Charan v. *Maharaja Ranjit Singh* (1) and refusing to allow the plaintiff to adduce evidence regarding rate of rent per bigha as unnecessary.

Against that decision the plaintiff appealed and the lower appellate Court on 13th December, 1937 sent back the case for finding out what should be fair and equitable rent at the time when the suits were instituted after allowing additional evidence to be adduced by the parties; the dismissal however of Suits Nos. 1815 and 1098 and also the decision as regards other matters in issue were upheld; upon a retrial before the Munsiff Babu Nagendra Nath Mukherjee the plaintiffs alone adduced evidence on the point, that evidence was accepted by the Munsiff as reliable, and rents were assessed on the basis of collections at the time of the institution of the suits as directed in the order of remand.

Against that decision the defendants appealed while the plaintiff filed cross appeals, the lower appellate Court dismissed the appeals except Appeals Nos. 43 and 49 in respect of which it modified the judgment of the trial Court by reducing the rate per bigha from Rs. 2-8 annas to Rs. 1-12 annas.

As to cross appeals, it modifies the decision of the trial Court only to the extent that interest at 6% per cent. was allowed on the decretal amount till realisation, the rest of the cross appeals being dismissed. From that decision the defendants preferred the present appeals.

The only point urged before us in these appeals is whether or not the assessment of rent has been made upon a correct basis The contention by the plaintiff respondent is that it should be on a fair and equitable basis in reference to the time when the suits were instituted while the contention for the defendant appellant is that it should be on a fair and equitable basis in reference to the principles laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (1).

A preliminary objection to the hearing of this matter has however been taken on behalf of the plaintiff and it is urged that as there was no appeal preferred against the order of remand by the lower appellate Court, dated 13th December, 1937, the defendant is precluded in view of section 105(2) of the Civil Procedure Code from raising the question on appeal from the decree; it is said that the order was appealable under order 43 rule 1 being to all intents and purposes an order of remand under order 41

(1) (1917) 27 C. L. J. 532.

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rule 23 and the cases of *Mohamad Ali Fakir* v. *Karam Ali* (1); *Basumati Debi* v. *Taritbashini* (2); *Prasanna Chandra Chattopadhya* v. *Baidya Nath Mistry* (3) are relied upon in support.

The defendant appellant however urges that in the present case, the whole suit was not disposed of upon any preliminary point, the trial Court decided the several issues on their merits and except for one issue viz. Issue No. 2, in respect of which the lower appellate Court remanded the suit, the decision upon all the other issues was affirmed by it, that therefore neither in form nor in substance the order of remand could be treated as one under order 41 rule 23, or purporting to be under it, though irregularly made, no appeal therefore could be preferred from the order and consequently section 105 Civil Procedure Code could have no application. The cases cited by the plaintiffs respondents were thus clearly distinguishable and the order of remand as it was, could only be made under the inherent jurisdiction of the Court (section 151 Civil Procedure Code) and no appeal is permissible where a remand is made under such jurisdiction: *Venkata Radha Krishna Rao* v. *Venkata Rao* (4); *Ramanath Naskar* v. *Tarak Nath Banerjee* (5); *Banka Behari Deb* v. *Birendra Nath Dutt* (6); *Mohendra Nath Chakravarti* v. *Ramtaran* (7). The above contention put forward by the appellant seems to me to be sound. I therefore overrule the preliminary objection raised by the plaintiff.

Now coming to the merits of the appeal itself, it should be remembered that the rent in connection with a patni tenure is to be a rent fixed in perpetuity and not liable to variation; there should therefore be some broad principle on which such rent could be fixed in the absence of any contract between the parties. That principle seems to me to have been laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (8).

No case has been placed before me which can be said to lay down a different or a contrary rule. It is to be noticed that the interest of the zemindar does not arise from the transfer to him by

(1) (1934) 38 C. W. N. 1202.
(2) (1918) 31 C. L. J. 354.
(3) (1920) 31 C. L. J. 360.
(4) (1924) I. L. R. 48 Mad. 713.
(5) (1928) A. I. R. Calc. 305.
(6) (1927) I. L. R. 55 Calc. 219; 47 C. L. J. 69.
(7) (1919) 31 C. L. J. 357.
(8) (1917) 27 C. L. J. 532.

the Collector under section 50 of Bengal Act VI of 1870 which operates merely by way of confirmation: *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (1).

I think therefore that the *amount* of rent payable by the patnidar should not be made to depend solely upon the circumstance of the point of time chosen by the zemindar or by the patnidar to bring their respective suits for ascertainment of rent or for khas possession and that there should be something more definite upon which one could proceed for making a fair and equitable assessment. No evidence has been adduced by the plaintiff to show what was the gross collection at the time of the creation of the original patni in 1853 so that it is not possible here to find out the proportion between the gross collection and the patni rent formerly payable and determine through it the proportionate rent for the chowkidari lands in suit; in the circumstances I think the only other alternative in the present case is to assess fair and equitable rent on the basis of the annual value of the land determined by the Collector at the time of the resumption in 1899 in the manner laid down in the case of *Radha Charan* v. *Maharaja Ranjit Singh* (2) which was followed by the learned Munsiff Satyendra Nath Palit in his decision on 4th March, 1937.

I am not much impressed with the argument by the learned Advocate for the plaintiff-respondent that the decision in the suit for khas possession having provided for "additional rent to be determined on the principle that the original patni rent should bear the same ratio to the patni rent now payable by the plaintiffs as the original hustabud at the time of the creation of the patni should bear to the present increased hustabud or *any other fair and equitable rent which may be determined at the time of assessing the mesne profits*," the plaintiffs were entitled to get fair rent assessed on the *basis of the collections that were made at the time of the mesne profits proceedings* in the absence of any evidence of a later period which was being withheld by the defendant. As a matter of fact assessment of rent has been made by the Court of appeal below upon that basis namely on the collections shown by the plaintiff between 1906-1910 but as I have observed before I do not think this to be a correct basis. It was laid down in the case of *Radha Charan* (2) that "while the annual value is taken as the measure which determines the assessment payable by the zemindar to the

(1) (1917) L. R. 44 I. A. 117; I. L. R. 44 Calc, 841; 25 C. L. J. 499.
(2) (1917) 27 C. L. J. 532.

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Government an entirely different basis should not be adopted to determine the amount payable by the patnidar to the zemindar." Similar view has also been expressed in the case of *Mehdi Hossain* v. *Naresh Chandra* (1). I accordingly set aside the judgment and the decree of the Court of appeal below in this respect and restore those of the learned Munsiff Babu Satyendra Nath Palit.

There will be no order as to costs in these appeals.

This judgment will also govern the analogous appeal S. A. No. 823 of 1939 which arises out of Suit No. 23 of 1937 and raised the same question.

Blank, J. :—I agree.

A. T. M. *Appeals decreed in part.*

(1) (1917) I. L. R. 45 Calc. 685.

Before Mr. Justice B. K. Mukherjea, and Mr. Justice T. H. Ellis.

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January, 8, 9, 10, 11, 12, 24.

JITENDRA NATH SUR AND OTHERS.

v.

AMARENDRA NATH SUR.*

Partition—Benami—Burden of proof—Sale certificate—Civil Procedure Code (Act V of 1908), section 66—Life policy—Nominee—Policy money, who is entitled to.

Where the sale certificate stands in the name of A, the Court is bound to presume that he is the real owner of the property and the burden lies upon the person alleging the purchase to be benami to rebut the presumption and show that the apparent state of affairs is not the real state.

Section 66 of the Code of Civil Procedure is confined to suits for possession.

Quære: Whether section 66 of the Code of Civil Procedure is applicable to partition suit.

A person, a Hindu, who was made a nominee in life assurance policy by the assured after 1st April, 1923, ranks as a beneficiary and is entitled to the policy money.

* Appeal from Original Decree No. 207 of 1941, against the decree of Asutosh Ukil Banerjee, Esq., Subordinate Judge, 3rd Additional Court, of 24-Parganas at Alipur, dated the 25th April, 1941.

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Appeal by the Plaintiff and Defendants Nos. 2 to 14 and cross-objection by Defendant No. 1.

Suit for partition.

The material facts appear from the judgment.

Messrs. Atul Chandra Gupta and *Siddheswar Chakravarti* for Appellants Nos. 4 to 14.

Mr. Bhutnath Chatterjee for the Appellant No. 1.

Mr. Chandra Narayan Laik for the Appellants Nos. 2 and 3.

Messrs. Chandra Sekhar Sen, Kshitindra Kumar Mitter, Nil Kanta Chatterjee, Rash Behari Mukherjee and *Narayan Chandra De* for the Respondent.

C. A. V.

The following judgments were delivered:

January, 24.

Mukherjea, J. :—This appeal is on behalf of the plaintiff and defendants Nos. 2 to 14 and it arises out of a suit for partition and accounts commenced by the plaintiff in respect of properties both movable and immovable left by his father, one Surendra Nath Sur, who was a Hindu resident of Maniktala with the jurisdiction of the Alipore Court and died on the 15th of January 1935. It appears that Surendra, though not born of rich parents, did acquire considerable properties in his lifetime. He started his life as a maker of gold ornaments and then took to the more profitable business of purchasing and selling lands and houses and increased his wealth to a great extent by lending money at high rates of interest on pledge of ornaments and jewellery. He married three wives in succession. By his first wife he had an only son named Amarendra, who is defendant No. 1 in the suit and the sole respondent in this appeal. The second wife died soon after her marriage leaving a daughter named Bidyutlata who was married during the lifetime of Surendra and does not figure as a party in this litigation at all. The third wife Annapurna who survived her husband is defendant No. 10 in the suit. By this wife Surendra had nine sons and four daughters. The eldest of these sons, Jitendra, is the plaintiff in the suit, the other sons being defendants Nos. 2 to 9, while the four daughters who are all unmarried figure as defendants Nos. 11 to 14. The plaintiff Jitendra claimed a 1/11th share of the properties, movable and immovable left by Surendra which were described in the various schedules attached to the plaint. Of these, two items of immovable property—one a vacant plot of land in the city of Calcutta being premises No. 227B, Upper Circular Road, and the

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other a mourashi mokarari jalkar named Beri Bangor situated a Gobardanga in the District of Jessore, which were described a items (D) and (E) of Schedule A to the plaint—did, according t the plaintiff, belong to Surendra and were acquired with his ow money though the purchases were made in the Benami Amarendra, the defendant No. 1. Of the movable properties again regard to which partition was prayed for, item (G) of schedule C a items (D), (G) and (H) of schedule D stood in the name Amarendra. The first was a loan on an equitable mortgage p porting to be advanced by Amarendra to Surendra Nath Du The second was the amount, due under a decree made by t Original Side of this Court in Suit No. 1340 of 1930, on the b of a promissory note executed by one Prafulla Kumar Sur in fav of Amarendra. The third and the fourth items were monies due promissory notes one of which was executed by Butto Kristo N and the other by Prafulla Kumar Sur and in both of t Amarendra figured as the ostensible lender. The plaintiff's c was that Amarendra had no property of his own and all t monies belonged to Surendra and were advanced by him in name of Amarendra. The plaintiff further claimed accounts f Amarendra on the allegation that the latter being the eldest o brothers managed the joint estate as Karta of the family and not only collected large sums of money in satisfaction of debts decrees but also realised rents in respect of immovable prope Lastly, the plaintiff prayed for an order of the Court setting appropriate sums of money for the maintenance and mar expenses of his four unmarried sisters who were impleade defendants Nos. 11 to 14 in the suit.

The suit was contested by Amarendra, the defendant alone. The other defendants did not file written statements th some of them prayed for separate allotment of their shares i joint property. The material defence raised by defendant was of a three-fold character. His first and main contentio that the two items of immovable property as well as the decre loans specified in the plaint schedules which stood in his were his own self-acquisitions. They did not appertain to the of late Surendra Nath Sur and were not divisible amongst his In the second place, his case was that there were several properties which belonged to Surendra and hence formed th properties of the parties though they were not included plaintiff in his plaint. These properties were set out in sche attached to the written statement and consisted of the fo

items:—(a) premises No. 1/4 B, Kanta Pukur Lane in the city of Calcutta, purchased by Surendra in the name of the plaintiff; (b) undivided half share of a plot of mourashi mokarari garden together with pucca structures situated at Bally in the District of Howrah; (c) money due on a promissory note executed by Phani Bhusan Bose, Solicitor, in favour of Surendra Nath Sur, the money being realised by the plaintiff; (d) a sum of Rs. 1601 obtained by the plaintiff Jitendra by assignment of an agreement for purchase of a plot of land in Calcutta, the agreement being really entered into by Surendra during his lifetime in the name of Jitendra and the earnest money paid by him; (e) amount due on a promissory note executed by Sailaja Nath Roy in favour of Surendra on hypothecation of certain jewellery and ornaments; (f) ornaments and jewellery hypothecated by various debtors which became the property of Surendra or still remained as pledged articles; (g) residue of the stock in trade of the jewellery and goldsmith business of Surendra still lying in the hands of the plaintiffs; (h) furniture of the goldsmith shop; and (i) utensils and furniture for domestic use.

It was further averred by the defendant in this connection that a sum of Rs. 9000 which was due under three life insurance policies of Surendra Nath Sur and which were paid after his death to Annapurna as being the nominee mentioned in the contracts of insurance, could not be legally claimed by her and this money really appertained to the estate of Surendra Nath Sur and was liable to be partitioned amongst his heirs. The third material defence taken by defendant No. 1 was that he never assumed the position of a Karta in the family and never managed the Ejmali estate; on the other hand, it was Jitendra, the plaintiff, who got hold of the account papers, cash and jewellery after the death of the father and it was he who collected the rents and profits of the joint estate. The entire liability to account was thus on the plaintiff and not on defendant No. 1 who was literally turned out of the house by Jitendra and his brothers.

The suit was heard by the Subordinate Judge, third Court, Alipur, and by his judgment dated April 25, 1941, a preliminary decree for partition and accounts was passed by the learned Judge. The findings arrived at by him on the points in controversy between the parties are as follows:—(A) The two items of immovable property described in paragraphs (D) and (E) of schedule A to the plaint and which stood in the name of Amarendra were held to be his self-acquired properties. With regard to item (E) which

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is the jalkar property, it was further held that the plaintiff's claim in respect of the same was not entertainable in view of section 66 Civil Procedure Code. The loan advanced to Surendra Nath Dutta on equitable mortgage was held to belong to Amarendra while in regard to the other loans and decree which were referred to in paragraphs (D), (G) and (H) of schedule D to the plaint, it was held that the money belongs to Surendra and not to defendant No. 1.

(B):—Item (a) of schedule 2 of the written statement was admitted by the plaintiff at the close of the hearing of the suit to be the property of his father though the document was in his name and it was found by the Court to be joint property and as such it was held liable to partition. Item (b) was excluded from the suit as persons other than those who were parties to this suit were interested in it. Items (c) and (d) were found to be joint property. Regarding Items (e) to (i) which included pawned jewellery as well as furniture and stock in trade, the Court held that these matters should be enquired into by an accounts Commissioner as it was not possible without proper investigation of accounts to ascertain the nature and extent of these properties. As regards the sum of Rs. 9000 due under the life insurance policies of Surendra, the Court found that the money was paid to Annapurna and no part of it was retained by Amarendra. Annapurna however as a nominee under the policies was not legally entitled to the money which belonged to all the heirs of Surendra. It was held therefore that this money was available for partition amongst the co-owners.

(C):—On the question of liability to account, the Subordinate Judge was of opinion that the plaintiff Jitendra took possession of the account books, the ornaments, jewellery and the keys to the chest and almirahs after the death of Surendra. It was Jitendra who looked after the construction of premises No. 1/4B, Kanta Pukur Lane and realised rents from the tenants occupying the various rented premises. Amarendra was also found to have made some collections, and he was held to have taken part in the Succession Certificate proceedings and the Sradh ceremony of Surendra along with the plaintiff. Both the plaintiff and the defendant No. 1 were held liable for accounts in respect of collections and disbursements made by each one of them.

The preliminary decree was made by the Subordinate Judge on the basis of these findings. The plaintiff and defendant No. 1 were

held entitled each to 1/10th share of the properties found to be joint and Survey Commissioner was directed to be appointed for carrying on the partition. It was further directed that a separate Commissioner would be appointed for taking accounts and investigating the matters relating to pawned jewellery and other things mentioned in the judgment. It is against this decree that the present appeal has been filed by the plaintiff and all the defendants except defendant No. 1. The defendant No. 1 has preferred a cross-objection attacking that part of the decree which is against him.

Although only one appeal was filed by the plaintiff and defendants Nos. 2 to 14 jointly, there was separate representation of different sets of appellants at the hearing of the appeal. Mr. Gupta argued the appeal on behalf of defendants Nos. 4 to 14, while Mr. Bhutnath Chatterjee appeared for the plaintiff and raised some special points on behalf of his client. Mr. Chandra Narayan Laik appearing for defendants Nos. 2 and 3 adopted the arguments of Mr. Gupta and contended that his clients should have been given separate allotments on partition.

Mr. Gupta has contended in the first place that on the evidence in the record the Court below ought to have held that the two items of immovable property, namely, the jalkar Beri Bangor and premises No. 227B, Upper Circular Road, were acquired by Surendra Nath Sur with his own money in the Benami of defendant No. 1 and that the latter was not the sole owner of these properties. It was also argued that section 66 of the Civil Procedure Code did not bar the plaintiff's suit so far as it related to the jalkar Beri Bangor. The second ground taken by Mr. Gupta relates to the sum of Rs. 2000 advanced on equitable mortgage to Surendra Nath Dutta. It is said that the Court below while negativing the case of defendant No. 1 that the money lent, belonged to him erred in holding that this was an advancement by the father to the son for the benefit of the latter. The third ground put forward by Mr. Gupta is that the Court below is wrong in holding that the sum of Rs. 9000 due under the life insurance policies of Surendra could not be legally claimed by Annapurna, his widow and he has challenged also the findings of fact arrived at by the trial Judge that the money was actually paid to Annapurna. In the last place, Mr. Gupta has argued that the directions given by the learned Judge as regards the taking of accounts are neither proper nor adequate and that the Subordinate Judge was wrong in not allowing any share to the widow and not making any provisions

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for the maintenance and marriage expenses of the unmarried daughters.

On behalf of the plaintiff appellant Mr. Chatterjee has taken two additional grounds: the first is that the sum of Rs. 1601 which the plaintiff obtained by assignment of an agreement for purchase of certain land should have been held to be his exclusive property and not liable to partition. The other ground is that the finding of the Court below that the plaintiff is guilty of misappropriating the pledged ornaments and jewellery is a baseless finding which is not supported by any evidence on the record. We will take up these points in their proper order.

The first point for consideration is whether the learned Judge was right in holding that the two items of immovable property namely items (D) and (E) of schedule A to the plaint as well as the money advanced to Surendra Nath Dutta on equitable mortgage which has been described in paragraph (G) of schedule C are the properties of Amarendra and not the joint properties of the parties. We will begin with the jalkar Beri Bangor in regard to which a considerable mass of evidence has been adduced by the parties.

This property is a fishery of some value situated at Gobardanga in the District of Jessore. It was held by one Gunendra Krishna Mallik as a permanent tenant under Annada Prasanna Mukherjee of Gobardanga at a fixed rental of Rs. 615 a year. Gunendra had borrowed money from Surendra Nath Sur on certain promissory notes and as security for the loan he pawned certain jewellery and ornaments with Surendra and had also deposited with him the title deeds of this Jalkar. On June 19, 1923, Surendra Nath Sur got a decree for Rs. 15100 against Gunendra on the basis of the promissory notes in the Original Side of this Court (Vide Exhibit 2). Annada Prasanna, the landlord of the Jalkar also got a decree for rent in respect of the Jalkar against Gunendra Krishna Mallik and in execution of the decree Gunendra's interest in the fishery was put up to sale and it was purchased on the 19th February 1924 by Amarendra, the defendant No. 1, for the price of Rs. 5000. The sale certificate is Exhibit 1 in the suit. The main question for our consideration is whether Amarendra, the ostensible purchaser was the real purchaser or it was Surendra who purchased the property in the Benami of his son. Amarendra was about 22 years of age at the time when the sale took place. The learned Subordinate Judge has laid stress on the fact that Amarendra was a motherless child and it was not unnatural that Surendra had considerable

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affection for him. This fact, in our opinion, is not very material for our present purposes as the defendant did not attempt to make out any case of advancement by the father. As the sale certificate stands in the name of Amarendra the Court is certainly bound to presume that he is the real owner of the property and the burden lies upon the plaintiff to rebut the presumption and show that the apparent state of affairs is not the real state. We will have to see whether the plaintiff has been able to discharge this burden satisfactorily. The plaintiff attaches great weight to the fact that Amarendra was a mere dependent of his father at the time when the property was purchased; he had no money of his own and consequently was not in a position to pay the sum of Rs. 5000 which was the price of the property. The case of Amarendra is that his mother had ornaments worth about Rs. 2500 which he inherited on her death. These ornaments were sold and the sale proceeds were in the hands of his father and invested by him and with this money the property was purchased. That Amarendra's mother had some ornaments can certainly be conceded. In fact, in the interrogatories served by the plaintiff upon defendant No. 1 one of the questions specifically put to the defendant was whether the ornaments belonging to the mother of the defendant were given over to the plaintiff's mother at the time of her marriage. Bijoy Neogi (D. W. 5) who is a relation of the parties has given in his evidence a list of ornaments which Amarendra's mother had; and another witness of the defendant namely, Prafulla Sur (D. W. 4), says on oath that Surendra's first wife had ornaments of the value of Rs. 2000. It appears that the father of Amarendra's mother was once in affluent circumstances and the story that the lady had no ornaments given to her at the time of her marriage cannot possibly be believed. Prafulla Sur says expressly that he personally knew that these ornaments were sold and invested by Surendra and that the investment produced a good income which remained in the hands of Surendra till 1920. We agree with the Subordinate Judge, in holding that although Amarendra had not acquired any earning capacity in the year 1924 he had certainly some money which he inherited from his mother. This money lay all along with his father who carried on a business in money lending and it was not improbable in these circumstances for Amarendra to have at his disposal a sum of Rs. 5000. There is absolute absence of any positive evidence coming from the plaintiff's side indicating the source from which the purchase money came. The best thing for the plaintiff would have been to produce the account papers of Surendra which

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would have thrown considerable light on this point. These however are not produced and the presumption being in favour of defendant No. 1 and the circumstances and probabilities not being against such presumption we cannot say that the Court below was in error in holding that the price of the Jalkar was paid out of the money belonging to Amarendra. Phanindra Nath Bose, the solicitor of Surendra who was examined as P. W. 8 says in his deposition that he advised Suren Babu to purchase the Jalkar at the rent sale though he did not advise him to make the purchase in the name of Amarendra. It appears from the evidence that the surplus sale proceeds amounting to about Rs. 3000 were lying to the credit of Gunendra Mallick after satisfying the dues under the rent decree. Gunendra had in the meantime been adjudged insolvent and his properties had vested in the Official Assignee. We have in this case a letter from the Official Assignee (Exhibit 19) dated the 7th March 1924, intimating to Surendra that he has no objection to the latter's withdrawing the surplus sale proceeds in part satisfaction of his decree against Gunendra.

Mr. Gupta's argument in substance is that though there is no direct evidence adduced in this case to show that the consideration money was paid by Surendra yet the way in which the property was treated and rents paid and realised and the conduct of the landlord and of Surendra himself would prove beyond doubt that it was a case of Benami purchase. Several rent receipts have been filed in the case showing how rents were paid to the zemindar of Gobardanga in regard to this Jalkar. They are Exhibit 5 series. In all these rent receipts the name of Amarendra appears as the tenant but the rents were invariably paid through Surendra and on two occasions the payments were made by cheques. Regarding realisation of rents and profits of this Jalkar, the evidence is that Surendra used to hold khas baich regularly for the purpose of catching fish and on such occasions he was usually though not necessarily accompanied by Amarendra. The Jalkar was in charge of a Gomasta named Rajendra Lal Mukherjee. From the letters addressed by Rajendra to Surendra it appears that in all matters relating to management of this property the Gomasta acted according to the advice and directions of Surendra. The Chalans (Exhibit 11 series) show that the realisations from the Jalkar used to be sent direct to Surendra. All these certainly indicate that the property was under the direct control and management of Surendra but they are not necessarily inconsistent with the view that Amarendra was the owner of the property but he being young nad

in experienced and himself remaining under the care and control of his father it was the father that was managing the property on his behalf. Here again we have no evidence as to the way in which the accounts of the Jalkar were kept. Mr. Gupta in course of his arguments referred to certain letters written by the zemindar to Surendra Babu (Exhibits 13a and 13d) which would show according to him that Surendra and not Amarendra was treated as the real tenant in respect of the Jalkar by the superior landlord. There is no doubt that Surendra used to do everything in connection with the Jalkar and the zemindar it seems was very familiar with him and used to write to him in matters relating to payment of rent and other things. Such letters used to be addressed to Amarendra also, (Vide Exhibits B1, B2, B4 and B5) and we cannot say that they are all formal letters. It appears that there was an agreement between Surendra and the landlord regarding the removal of water-hyacinth from the fishery. The zemindar promised to contribute a sum of Rs. 500 towards the cost of removing water-hyacinath and on the 9th May 1933 a sum of Rs. 200 was paid by the landlord by setting it off against his claim for rent in respect of the Jalkar. The agreement is embodied in Exhibit 27 which is the counterfoil rent receipt granted by the Gobardanga estate regarding this sum of Rs. 200. Surendra Nath Sur, it is said, gave a receipt also acknowledging payment of Rs. 200 out of the contribution of Rs. 500 promised by the landlord. The receipt has been produced as evidence in this case and has been marked Exhibit 28. There is a recital at the beginning of this document that it was in respect of Jalkar Beri Bangor carrying a Jama of Rs. 615 recorded in the name of Amarendra Nath Sur, the son of Surendra Nath Sur. On behalf of the plaintiff considerable stress was laid on this recital and it was said that it amounted to an assertion by Surendra himself that the Jalkar was his own property held in the Benami of his own. The learned Subordinate Judge after a good deal of discussion came to the conclusion that this document was fabricated by or in the interest of the plaintiff. We do not think that such inference is legitimate or proper. The fact that there was an agreement between the Gobardanga zemindar and Surendra regarding the cost of removal of water-hyacinth is not at all disputed. As a sum of Rs. 200 was paid by the zemindar by setting it off against his claims for rent it is quite natural that the zemindar must not only grant a rent receipt for the said sum but the tenant also would give an acknowledgment in token of his having received a portion of the promised contribution. The body of the receipt is

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undoubtedly not in the handwriting of Surendra but the signature appears to be his. In our opinion, the evidence on the record does not justify us in finding that the receipt is not a genuine one. But even though genuine we do not think that it carries the plaintiff's case very far. The fishery, as we have said already, was entirely under the management and control of Surendra and it was he who figured in all affairs connected with it. There is nothing unnatural in his filling the receipt in acknowledgment of the payment of Rs. 200 and the statement in the receipt that it was given in respect of Jalkar Beri Bangor recorded in the name of Amarendra does not in our opinion amount to an assertion by Surendra that it was his property held in the Benami of his son. It will be pertinent to point out that after the death of Surendra there was a proceeding for taking out succession certificate and in this application for certificate not only Amarendra but the plaintiff, his mother and the major brothers also joined. Amarendra had to execute a security bond under orders of the Court and in the affidavit containing the list of properties owned by his (Exhibit 16a) it is expressly stated that he was 16 annas owner of Beri Bangor and of premises No. 227B, Upper Circular Road. This statement was a clear and open assertion of his title in the presence of the plaintiff and the other brothers who were interested in the property and nobody it seems raised any objection to it. On the whole, it seems to us that the evidence that has been adduced by both sides in this case is inconclusive and does not lead to any definite conclusion either one way or the other. In these circumstances, the presumption that arises in law in favour of defendant No. 1 cannot be said to be rebutted and we cannot say that the decision of the Court below is wrong.

The learned Subordinate Judge has further held that so far as the plaintiff's claim to Beri Bangor is concerned, the suit is barred under section 66 Civil Procedure Code. The propriety of this decision has been challenged by Mr. Gupta on behalf of the appellants. Section 66 provides that no suit shall be maintained against a certified purchaser in an execution sale on the ground that the purchase was made on behalf of the plaintiff. It is conceded by Mr. Gupta that in view of later decisions on this point it cannot be maintained that section 66 Civil Procedure Code is confined to suits for possession only. He contends however that the section is to be construed strictly and it only applied where the plaintiff in a suit is bound to aver and prove for the purpose of obtaining relief that the defendant who is a certified purchaser is

his Benamdar. It is said that in a suit for partition, this very question could have been raised by any of the defendants also. As the question of Benami purchase could have been raised in the suit by the defendants other than Amarendra and in that event the bar under section 66 Civil Procedure Code could not have been invoked Mr. Gupta argues that section 66 Civil Procedure Code cannot be made applicable to partition suits at all where everyone of the parties occupies the position of both plaintiff and defendant. On the side of the respondent it is argued that in the case before us the question has been raised by the plaintiff and not by the other defendants and it is not material at all to consider as to what the position would have been if the question had not been raised by the plaintiff. The point undoubtedly is of some importance and requires careful consideration but as in the present case we have already held on evidence that the defendant No. 1 is not the Benamdar, it is not at all necessary for us to express our opinion on this question of law.

We have now to consider whether in regard to premises No. 227 B, Upper Circular Road, the learned Subordinate Judge was right in holding that Amarendra was the real owner and not a mere Benamdar of his father. This property is a small plot of vacant land measuring a little over two cottas and is a part of a bigger plot having an area of 15 to 16 bighas. There was admittedly an agreement for purchase of the entire plot of 15 bighas by and between Surendra and the owners of the property at a price of Rs. 1200 per cotta, and it is also proved that earnest money under this agreement of purchase was paid by Surendra to the vendor. From the deposition of Mr. P. Bose, the solicitor of Surendra we gather that the agreement fell through as the solicitor was not satisfied with the title of the vendors. Mr. Bose says that although he did not advise Surendra to purchase this property because of the defective title he asked him to approach Mr. N. K. Roy Choudhury, the solicitor of the vendors, if he wanted to complete the purchase. It is difficult to understand how approaching the vendors' solicitor could improve the position if really there was defect in the title. Be that as it may, we find that on the 27th March 1931, only two cottas and odd of land was sold by one of the proprietors and the price was only Rs. 600 a cotta. The Kobala stands in the name of Amarendra and Amarendra says that he purchased this property with his own money. Here again we have got no direct evidence as to the source of the consideration money. The learned Subordinate Judge has held that Amarendra got dowry at the time of

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his marriage amounting to about Rs. 2000 and with this money he made the purchase. Two of the defence witnesses namely, Prafulla Sur (D. W. 4) and Manmatha Neogi testify to the fact that at the time of Amarendra's marriage he received a cash dowry of Rs. 2000 in addition to the ornaments which were presented to his wife. There is no reason to disbelieve this story and it was not impossible therefore for Amarendra to purchase this property out of the money which he received at the time of his marriage. The municipal bills and tax receipts are all in his name. The plot being a vacant plot no definite acts of possession were exercised by anybody which might throw any light on the question of ownership. Mr. Gupta lays stress on a letter written by Mr. N. K. Roy Choudhury dated the 28th February 1931 to Surendra Nath Sur telling the latter that he could erect a boundary wall on the land at his own cost and if necessary he could obtain police help in the matter. It is difficult to say whether it refers to the bigger plot in regard to which there was this original agreement or to the smaller plot which was eventually purchased by Amarendra. The circumstances relating to the erection of the boundary wall and the necessity of having police help in the matter have also not been cleared up by any evidence. Mr. N. K. Roy Choudhury is dead but nobody in his office has been examined on behalf of the plaintiff nor has his day book been called for. On the other hand from the evidence of Mr. Phani Bhusan Bose, the plaintiff's solicitor, it can be gathered that after the cancellation of the Bainanama entered into by Surendra the latter got back the earnest money from the vendors and consequently it cannot be said that the earnest money paid by Surendra constituted the whole or any part of the consideration for which this property was purchased by Amarendra. As only Rs. 1300 was necessary for purchasing the property it is not improbable that the purchase was really made by Amarendra though he acted certainly under the advice of his father. As stated already, this is one of the properties which was stated in the affidavit (Exhibit 16 a) filed in the Succession Certificate proceeding to be the sole and exclusive property of Amarendra himself. Taking all these facts into consideration we are of opinion that with regard to this property also the plaintiff has failed to rebut the presumption which is in favour of defendant No. 1 and consequently the decision of the Court below must be upheld. The first point raised by Mr. Gupta is thus decided against the appellants.

The second point raised by Mr. Gupta relates to the sum of Rs. 2000 which was lent to Surendra Dutta on equitable mortgage.

The learned Subordinate Judge has held that there is no evidence to show that Amarendra had any separate fund of his own at the time when the money was advanced, but he holds nevertheless that this amount was really an advance by the father for the benefit of Amarendra. This finding obviously cannot stand. There is no presumption of advancement in this country and no case of advancement was sought to be made out by any evidence in this case. Mr. Chandra Sekhar Sen, appearing on behalf of the respondents, attempts to support the decision of the Subordinate Judge on the ground that Amarendra had money of his own by reason of the dowry which he received at the time of his marriage and it was not impossible for him to advance this money by way of loan to Surendra Dutta. We do not think that we can accept this argument as sound. The case was sought to be made that Amarendra purchased the Circular Road property with the money obtained by him at the time of his marriage. As the sum was only Rs. 2000 certainly he had not sufficient surplus left, out of which this loan could be advanced to Surendra Nath Dutta. On the other hand, Amarendra admits in his deposition that Surendra Dutta was in the habit of receiving loans from his father. In these circumstances, we think it must be held that this sum of Rs. 2000 advanced to Surendra Nath Dutta was money belonging to Surendra Nath Sur and it was not the exclusive property of Amarendra.

On the question of title to the sum of Rs. 9000 which was payable under the insurance policies on the life of Surendra, we are clearly of opinion that the decision of the Court below is not correct. The learned Subordinate Judge is of opinion that the mere fact that a person has been made a nominee by the assured does not entitle him or her to receive the money as no trust is created in favour of the nominee in such cases and he cannot sue on the contract. This was undoubtedly good law prior to the introduction of Act III of 1923. By that Act however the Married Women's Property Act has been amended and it has been made applicable to Hindus and some others in respect of policies effected after the first day of April 1923. It is conceded by Mr. Sen that the insurance policies in the present case were all taken after the 1st April 1923 and consequently the nomination being in favour of the wife she would rank as a beneficiary and would be entitled to the policy money. Mr. Sen has fairly conceded that this must be the legal position and the learned Judge was wrong in applying the law which would have been applicable had the policies been created prior to 1923. Mr. Gupta further says that the evidence on the record is not sufficient

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to show that the entire sum of Rs. 9000 was actually paid to Annapurna. It appears that the Insurance Company gave one cheque to Annapurna for the entire sum of Rs. 9000. This cheque was endorsed by Annapurna to Messrs. J. Sur and Co. and Fanindra Nath Sur who has been examined as a witness in this case says that in lieu of this cheque the firm of J. Sur and Co. gave two bearer cheques in the name of Amarendra, one for Rs. 5000 and the other for Rs. 4000. Both these cheques, it is said, were cashed and the entire money paid to Annapurna by Amarendra in the presence of this witness. The plaintiff's story on the other hand is that out of this Rs. 9000 a sum of Rs. 4000 was taken as a loan by Amarendra for the purpose of depositing the stamp in the Succession Certificate proceeding. The story of a loan is utterly unreliable and has been justly disbelieved by the learned Subordidate Judge. It seems however that very soon after the cheque of Rs. 4000 was drawn by J. Sur and Co. in the name of Amarendra a sum of Rs. 3000 and odd was actually deposited in the Succession Certificate proceeding. It may be that this sum was actually used for this purpose but we have no hesitation in holding that no part of it was retained by Amarendra and he is not answerable for this money or any portion of it, to Annapurna. As the money belonged to Annapurna alone, if she advanced it voluntarily for meeting the expenses of the Succession Certificate proceeding she might have a legitimate claim against all the heirs of her husband for the money that she might be proved to have actually advanced. This is not a matter which arises for our consideration in the present case and we need not express any opinion on this point. We can only say that we agree with the learned Subordinate Judge in holding that no part of this sum of Rs. 9000 was retained by Amarendra and he is not in any way answerable for it. The sum of Rs. 9000 certainly would not be treated as joint property and would not be available for partition amongst the heirs of Surendra.

It now remains for us to consider the last and the fourth point raised by Mr. Gupta. We have no doubt in our mind that the directions regarding the taking of accounts are not quite adequate and it may be necessary for the commissioner of the parties to seek further directions from the Court from time to time as the investigation proceeds. We may consider in this connection the second point raised by Mr. Chatterji on behalf of the plaintiff appellant. As has been pointed out already the Subordinate Judge has ordered that the matter relating to pawned jewellery and ornaments would

be investigated by the commissioner who would be appointed to take accounts. The learned Subordinate Judge has in course of his judgment recorded a finding that the pawned jewellery and ornaments have been misappropriated by the plaintiff. In our opinion, the plaintiff is right in his submission that as the matter is still to be investigated and as the commissioner has not looked into the accounts as yet, it is not quite proper and certainly premature to say that the plaintiff himself has been guilty of misappropriating all or any of the ornaments. There is evidence on the record to show that some at least of the pledged jewellery were given by Surendra as presents to his wife Annapurna. In our opinion, the entire thing will be open for consideration by the commissioner and the Judge should record his findings on this point after the commissioner's report is received and considered and the parties are given the opportunity to say what they have got to say on this point. It is conceded by the learned lawyers appearing for all the parties that the directions given by the Subordinate Judge regarding the partition of the joint properties are defective and to some extent erroneous. In the first place, the learned Subordinate Judge should have allotted 1/10th share of the joint properties to Amarendra and then directed that the remaining 9/10th should be divided equally amongst the other nine sons and the mother Annapurna herself. The Subordinate Judge was wrong in thinking that Annapurna was not entitled to a share and it was wrong also in allowing the plaintiff a 1/10th share of the entire property. It is also necessary we think that proper directions should be given regarding the maintenance allowances and the marriage expenses of the four unmarried daughters. But these things, as conceded by Mr. Gupta, should more properly be embodied in the final decree when the value of the total assets would be known and the accounts properly investigated.

The next thing that we have got to consider is the first ground raised by Mr. Chatterji on behalf of the plaintiff and this relates to the sum of Rs. 1601 which the plaintiff obtained by assigning an agreement of purchase which he had entered into with certain vendors in respect of a plot of land in Calcutta and for which earnest money to the extent of Rs. 101 only was paid by him. We think the Subordinate Judge had no materials before him to hold that Jitendra, the plaintiff, could not have procured this sum of Rs. 101 which was paid as earnest money for this agreement. This little sum he could have even collected out of the allowances which he received by working as an apprentice in the firm of

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J. Sur and Co. Mr. C. S. Sen, appearing for the respondent has not really contested this point and in our opinion the sum of Rs. 1601 should be regarded as the exclusive property of the plaintiff and it would not be brought into the hotchpot and treated as joint property of the parties. The appeal is thus disposed of.

The cross-objections, we think, are without any substance. They relate to the two items of loan and one decree specified in paragraphs (D), (G) and (H) of Schedule D of the plaint, with regard to which the exclusive title of Amarendra has been negatived by the Court below. As has been said already, there is no evidence to show that Amarendra had any separate fund of his own save and except the ornaments of his mother and the money which he received at the time of his marriage and consequently it cannot be held that the monies which were advanced on the promissory notes mentioned above really belonged to him.

The result therefore is that the cross-objections are dismissed and the appeal is allowed in part. The preliminary decree made by the Court below is modified in the following manner:—

1. The sum of Rs. 9000 paid under the insurance policies of Surendra should not be treated as joint property and would not be liable for partition. This would be taken to be the property of Annapurna Sur and in valuing the share which is to be allotted to her this sum as well as any other *stridhan* property she might have got should be taken into consideration.

2. The sum of Rs. 1601 which the plaintiff obtained by assigning his agreement of purchase should be treated as his own exclusive property and would not be liable for partition.

3. The loan advanced to Surendra Nath Dutta on equitable mortgage shall be treated as joint property of the parties and will be available for partition. The defendant No. 1 will have only the two immovable properties, namely, premises No. 227B, Upper Circular Road and the Jalkar Beri Bangor, as his self-acquisitions and they will not be partitioned.

4. Specific allotments should be given not only to the plaintiff and defendant No. 1 but also to defendants Nos. 2 to 10. Provisions for the marriage expenses of the daughters and also for their maintenance will be made after the commissioner's report is received and will be embodied in the final decree.

5. The parties as well as the commissioner for accounts will have the liberty to apply to the Court for directions from time to time as the examination of accounts proceeds and the finding of

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the Court below that the plaintiff has misappropriated the ornaments will remain open.

6. We make no order as to costs of hearing of this appeal. The entire paper book costs in this appeal have been advanced by the mother, defendant No. 10. We direct that these costs will be apportioned amongst the co-sharers according to their respective *shares.*

7. The Receiver already appointed will continue to be in possession till the final decree is made, and the Court below will be at liberty to direct the Receiver to pay certain sums of money from time to time as may be necessary for the maintenance of the co-sharers including the mother as well as of the unmarried daughters.

Ellis, J. :—I agree.

A. T. M.

Appeal allowed in part: Decree modified.

FEDERAL COURT.

PRESENT: *Sir Patrick Spens, Knight, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

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January, 15.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Ultra vires—*Indian Income Tax Act (XI of 1922, as amended in 1939), Sections 4-A (c) (2), 4 (1) (b), 64 (5)—Device to give jurisdiction—Extra-territorial jurisdiction—Imposition and assessment of income tax—Residence in India—Objection as to place of assessment—Where and when to be taken—Effect of raising objection in Reference to High Court under section 66, Indian Income Tax Act.*

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The second part of section 4-A(c) of the Indian Income Tax Act in so far as the Legislature authorising the inclusion of income arising out of British India is not *ultra vires* the Indian Legislature.

The provision in second part of section 4-A(c) of the Indian Income Tax Act is not extra-territorial in its operation. Even if they were in any measure extra territorial in their effect, that is not a ground for holding them to be *ultra vires* the Indian Legislature :

Governor-General in Council v. *The Raleigh Investment Company Limited* (1) followed.

The amendment of the Indian Income-tax Act in 1939 introducing the test of residence in British India is not a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. It is only a machinery provision which was adopted as a convenient mode of extending it to this class of assessees a particular set of provisions contained in the Act for the calculation of their assessable income. The objection, if any, must be to the imposition of the liability itself and not to the manner in which the provisions imposing such liability have been drafted.

The imposition and assessment of income tax must vary according to the exigencies of public finance in India and the methods of doing business found to prevail in this country. If the conditions of to-day require or justify other methods of taxation, there is no warrant for saying that the state here could only adopt the methods prevailing in England.

The mere fact of accrual of income abroad is not conclusive and when the cases refer in justification of such taxation, to the protection which a person enjoys by his residence in a particular country, the benefit of that protection is not limited to the income accrued or received in that country.

Once any connection with a particular state is shown, it creates a nexus between the state and the individual, so as to make that individual subject to the taxing power of the state : *Governor-General in Council* v. *The Raleigh Investment Company Limited* (1).

The Indian Income-tax Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made. The fact that the Appellate Tribunal thought fit to allow the question to be raised and even included it in Reference to the High Court cannot alter the legal position.

Where the Partnership Deed shows that the gentleman named therein shall carry on business in partnership as merchants and commission agents and reserves extensive powers to the appellants in respect of the business, the appellants though sleeping partners are still said to be carrying on business there within the meaning of section 64 (5) of the Indian Income-tax Act : Observations of Lord Parker in *Mitchell* v. *Egyptian Hotels Limited* (2) explained.

(1) [1944] F. C. R. 229.
(2) [1915] A. C. 1022 (1037).

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Federal Case No. LV of 1943.

Mr. F. J. Coltman, (Senior Advocate, Federal Court) (Mr. Nanubhai K. Desai, Advocate, Federal Court with him) and *Sir Jamshetji Kanga, Advocate, High Court, Bombay, instructed by Mr. B. Banerji, Agent* for the Appellants.

Mr. M. C. Setalvad (Senior Advocate, Federal Court) (Mr. G. N. Joshi, Advocate, Federal Court with him) instructed by Mr. K. Y. Bhandarkar, Agent, for the Respondent.

The judgment of the Court was delivered by

January, 15.

Spens, C. J.:—This is an appeal from the judgment of a Division Bench of the Bombay High Court on a reference under section 66 of the Indian Income-tax Act. The High Court granted a certificate under section 205 of the Constitution Act, because the main question raised by the reference related to the validity of sections 4-A (c) and 4 (1) (b) (ii) of the Income-tax Act. No objection has been taken to the maintainability of this appeal.

The reference arose out of the assessment of the appellant company to income-tax for the year 1939-40, the accounting year being 1938-39. It is common ground that during the accounting year the appellant company had an income of over 17 lakhs from British India and over 7½ lakhs from without British India. Under section 4 (1) (b) of the Income-tax Act, the "total income" in respect of which any person is assessable for any year is calculated in different ways according as the person is "resident in British India" or "not resident in British India". If the person is resident in British India, the total income includes not only income, profits and gains actually accrued or deemed to accrue in British India but also income accruing or arising to him without British India during the year. Residence in India for the purpose of the Act is defined in section 4-A, which is one of the sections introduced into the Income-tax Act by the legislation of 1939. Clause (a) of the section defines "residence" with reference to individuals, clause (b) with reference to undivided families, firms and other associations of persons, and clause (c) with reference to companies. As the appellant is a company, this is the clause relevant to the present case. It provides two tests—(1) whether the control and management of the affairs of the company is situated wholly in British India, or (2) whether its income arising in British India in the year in question exceeds its income arising without British India in that year. The appellant company does not satisfy the first test,

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because the control and management of its affairs is said to be in the United Kingdom. It however holds a 14/32 share in the firm of Messrs. Wallace and Company carrying on business in Bombay. The other partners, as per the partnership deed of 1935, were seven individuals therein named. The income of 17 lakhs and odd derived by the appellant from British India was made up of the four following items:—

(1) Rs. 8,76,266 being its share in the profits of Messrs. Wallace and Company;

(2) Rs. 18,197, being its share of dividends and interests received from that firm;

(3) Rs. 8,59,428, dividends received from other investments in British India; and

(4) Rs. 31,940, interest from other investments in British India.

As this income admittedly exceeded the appellant's income from without British India (which was only about 7½ lakhs) the Income-tax authorities treated the case as one falling under the second part of S. 4-A(c) and as a consequence they applied S. 4(1)(b) of the Act, with the result that tax has been assessed on the appellant's total income of over 25 lakhs.

The appellant objected to the inclusion in the assessment of its income from without British India and contended that the provisions of the Indian Income-tax Act were *ultra vires* the Indian Legislature in so far as they authorised the inclusion of such income in the assessment. This is the principal question in the case and forms question No. (2) in the reference. The first question is nothing more than an application to the facts of the case of the answer to the second question; it does not require separate discussion. The third question in the reference has no substance and it was admitted before us that the amended provision was applicable to the assessment in question, because 1939-40 was the assessment year though the figures have to be taken from the income for 1938-39. One other question in the reference, question No. (4), raises a question of procedure, to which it will be convenient to refer later.

Before the High Court and in the grounds of appeal to this Court, a grievance seems to have been made that certain other questions should also have been raised, so as to bring out clearly the points in dispute between the parties. During the arguments before us, it was conceded by counsel for the appellant that all that he desired to put forward on behalf of the appellant could be urged on the basis of the questions as they now stand. It is therefore unnecessary to refer further to this complaint.

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Relying on some of the decisions interpreting the word "residence" in the English Income-tax Act, counsel for the appellant contended that the second of the tests adopted in S. 4-A(c) of the Indian Income-tax Act was wholly artificial and unwarranted by established principles and that it had been so framed only as a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. The appellant company, it was said, did not "reside" here in any of the known senses of the term, and as its income from without British India did not *ex hypothesi* accrue here and it was not brought here, it was urged that it was beyond the power of the Indian Legislature to impose a tax on that income. It was argued that the Legislature could only tax persons resident here or income accrued, due or received here, and that any attempt to go further would make the Act illegally extra-territorial in its operation. It was contended on behalf of the respondent that even according to the English decisions, the definition of "residence" in respect of a company was to a certain extent artificial and that it was open to the Legislature to adopt whatever definition it thought fit. If the matter had stood on S. 4-A (c) alone, this would undoubtedly be so. But S. 4-A (c) is only a step towards the introduction of the measure of taxation laid down in S. 4(1)(b) and though each of these provisions taken by itself may be unobjectionable, their combined operation is undoubtedly to assess the appellant to tax in respect of all its income from without British India. Counsel for the respondent conceded that it is from this point of view that the validity of the provision must be judged. But he maintained that even on this basis the objection to the validity of the law was untenable—(1) because the impugned provisions were not really extra-territorial in their operation, and (2) because the extra-territorial operation, even if there was any, was no ground for the invalidation of the provisions.

We agree with the respondent's contention that the mere fact that the Indian Legislature has adopted a test of "residence" different from that obtaining in England is not by itself of much consequence. The course of decisions in England has attempted to give effect to what was conceived to be the policy of the English Income-tax law, in the light of the changing conditions and methods of carrying on business there. These decisions were partly based upon certain clauses in the English Act which limited the significance of the word "residence" in that Act, and gave some guide in considering whether a person did or did not come within the words

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"residing" in the United Kingdom. [*Vide: Attorney-General* v. *Alexander* (1)]. Reference has no doubt been made now and then to grounds on which that system of taxation could be justified, as for instance when it was said that a person resident in England or carrying on business in England enjoyed the benefit of the security and protection afforded to him by the State in England and that it was therefore not unreasonable to bring even his foreign income into account in assessing him to income-tax. But considerations like these cannot be erected into a rule of law limiting the taxing power of the State to those particular cases.

We cannot accede to the argument that the amendment of the Indian Income-tax Act in 1939 introduced the test now in question merely as a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. It was only a machinery provision which was adopted as a convenient mode of extending to this class of assessees a particular set of provisions contained in the Act for the calculation of their assessable income. The objection, if any, must be to the imposition of the liability itself and not to the manner in which the provisions imposing such liability have been drafted.

Relying upon certain observations in *Croft* v. *Dunphy* (2) counsel for the appellant contended that the powers conferred on the Indian Legislature by the Constitution Act must be interpreted in the light of the prevailing "legislative practice" in England. It may be that any particular expression used in a Parliamentary enactment relating to the constitution of a subordinate legislature will carry the connotation which by well-established usage it has acquired in English law or politics; and it may also be that if certain powers have long been understood in England to be incidental to or associated with certain other powers, words conferring the one will be understood as carrying the other as well. But we cannot interpret the observations in *Croft* v. *Dunphy* (2) as implying that the Indian Legislature must frame its income-tax legislation on the same lines or on the same bases as have been adopted or found convenient in England. The imposition and assessment of the tax must necessarily vary according to the exigencies of Public Finance here and the methods of doing business found to prevail in this country. Even as regards persons resident in this country, the Indian Legislature did not, till very recently, think it worthwhile or

(1) L. R. 10 Ex. 32.
(2) [1933] A. C. 156.

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find it necessary to take their income from without British India into account, in assessing them to income-tax, except to the extent to which such income had been brought into this country. If the conditions of today require or justify other methods of taxation, we see no warrant for holding that the State here could only adopt the methods prevailing in England.

As regards the contention that the impugned provisions are extra-territorial in their operation and accordingly beyond the powers of the Indian Legislature, we are of the opinion that taking the scheme as a whole they are not in their operation extra-territorial in the strict legal sense of that term. The Legislature has not attempted to regulate, punish or directly deal with any act done beyond the territorial limits of British India nor does it seek to impose a liability on property situate outside its jurisdiction. It was conceded on behalf of the appellant that when a person is resident in British India any legislation which brings his foreign income into account in assessing him to income-tax will not be extra-territorial. This illustration establishes (1) that the mere fact of the accrual of the income abroad is not conclusive, and (2) that when the cases refer in justification of such taxation, to the protection which a person enjoys by his residence in a particular country, the benefit of that protection is not limited to the income accrued or received in that country. Where the connection of the assessee with a particular country is not founded upon residence but arises out of business operations, it may be a question of degree whether the connection is slender or intimate, but it can nonetheless be as factual a connection as a connection based on residence. Many systems of law have enacted that if a person resides in a country for six months, he must be deemed to be "resident" there for purposes of income-tax though during the rest of the year he might have resided elsewhere. A person who receives a substantial business income from a country may well be regarded as receiving the protection of its laws and administration in the same degree as a person who resides there or carries on business there; and if a person resident in a country for six months can be taxed even in respect of his foreign income earned, it may be, during the remaining six months, it is difficult to see anything inherently objectionable in adopting the same basis when a person derives more than half his total income from business in a particular country. It is the *person* who is subjected to taxation in either case and his connection with the taxing country is as substantial in the one case as in the other, to warrant both cases being treated alike.

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Decisions of the English Courts afford little guidance on this question, in view of the difference in the scheme of taxation between the two countries. But some of the Australian decisions to which reference has been made in the judgment of this Court in *Governor-General in Council* v. *The Raleigh Investment Co., Ltd.* (1) afford some guidance. The facts in the *Raleigh Investment Co.* case (1) were no doubt different and the decision was based on the ground that the source of the income there was British Indian. But this Court there adopted the principle laid down in the Australian decisions that once "any connection" with a particular State is shown, it creates a nexus between the State and the individual, so as to make that individual subject to the taxing power of that State. The provision in the impugned clause that the company will be regarded as resident in British India only when its British Indian income exceeds its income arising without British India, ensures that the connection between the assessee and the State is real and not illusory. Observations like those in *Commissioner of Taxes* v. *Union Trustee Company of Australian* (2) do not bear upon the present case, because on a construction of the relevant statute their Lordships there found that the fact on which territorial jurisdiction was founded by that statute was not the personal residence of the tax-payer but the "local situation of the source of income". We are accordingly of the opinion that the impugned provisions of the Indian Income-tax Act cannot be held to be extra-territorial in their operation.

The second contention urged on behalf of the respondent that even if these provisions are in any measure extra-territorial in their effect, that is not a ground for holding them to be *ultra vires* the Indian Legislature is supported by the decision of this Court in the *Raleigh Investment Company* case (1). We have nothing to add to the reasons there set out in support of that conclusion.

The fourth question in the reference raises a question of procedure, *viz.*, the jurisdiction of the particular officer to assess the appellant. Section 64 of the Act provides that where an assessee carries on a business at any place he shall be assessed by the Income-tax Officer of the area in which that place is situated and that in all other cases an assessee shall be assessed by the Income-tax Officer of the area in which he resides. The High Court thought that the answer to question No. (4) was plain. "The assessee" it said "has been found to be a partner in the firm of Wallace and Company and the assessment was made by the Income-tax Officer for the

(1) [1944] F. C. R. 229.
(2) [1931] A. C. 258 (268).

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area in which Wallace and Company carry on busines". As the point has been pressed before us, it is necessary to deal with it in some more detail.

The following are the facts material to this question. On the 29th January, 1940, Wallace and Company acting on behalf of Wallace Brothers and Co., Ltd., filed the usual return of income, (page 50 of the paper-book). This was drawn up in accordance with the pre-existing practice. But as S. 4-A (c) had come into operation by that time, the Income-tax Officer, Companies Circle, by letter dated the 7th February, 1940, called for a statement of the total income of Wallace Brothers and Co., Ltd., "to enable me to determine whether the company is resident or non-resident as per section 4-A (c) of the Income-tax Amendment Act, 1939", (page 53 of the paper-book). By letter dated the 20th February, 1940, Wallace and Company took exception to this view and stated that they had no copy of the profit and loss account of Wallace Brothers and Co., Ltd.; when the Income-tax Officer insisted on having the information, they re-submitted the return of Wallace Brothers and Co., Ltd., reiterating their contention as to the non-liability of the income arising outside British India of Wallace Brothers and Co., Ltd., but they added, "to comply with your request we enclose copy of the balance-sheet and profit and loss account of Wallace Brothers and Co., Ltd., for the year ended 31st July 1938, but we do so under protest and without admitting in any way a liability to taxation on the world income", (page 56 of the paper-book). It is on the materials thus furnished that one Mr. Singh who was then Additional Income-tax Officer, Companies Circle, made the Assessment Order dated the 12th February, 1941, (page 15 of the paper-book). The assessee is there shown as Wallace Brothers and Co., Ltd., through Messrs. Wallace and Company, 9, Wallace Street, Bombay, and it is treated as a "resident company". Against this order, there was an appeal to the Appellate Assistant Commissioner signed by Wallace and Company as agents, under S. 43, of Wallace Brothers and Co., Ltd., (page 23), and as that officer confirmed the assessment, there was a further appeal to the Appellate Tribunal. The objection of non-compliance with S. 64 was for the first time raised before the Appellate Tribunal, (see page 27). That Tribunal was of the opinion that the assessment was in conformity with both clauses (1) and (2) of S. 64, because the assessee company was carrying on business in Bombay as a partner in Messrs. Wallace and Company and was also by reason of S. 4-A (c) deemed to be resident in Bombay.

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As regards the ground of residence in Bombay, counsel for the appellant rightly pointed out that according to S. 4-A(c) the question of residence must be determined with reference to each year and that the finding of residence during 1938-39 would not warrant the assumption that when the proceedings for assessment were started early in 1940, the appellant company was resident in Bombay. If this question becomes material, it may be necessary to ascertain whether in 1940 the appellant company could be deemed to have been resident in Bombay with reference to the conditions required by S. 4-A (c).

It however seems to us open to serious doubt whether the appellant is entitled to raise this question at all and whether it is really a matter for decision by the Court. Clause (3) of S. 64 provides that any question as to the place of assessment shall be determined by the Commissioner or by the Central Board of Revenue. The third proviso to the clause enacts that if the place of assessment is called in question by the assessee, the Income-tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made. These provisions clearly indicate that the matter is more one of administrative convenience than of jurisdiction and that in any event it is not one for adjudication by the Court. The second proviso to clause (3) further enacts that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of S. 22, or if he has not made such a return, it shall not be called in question after the expiry of the time allowed by the notice for the making of a return. This confirms us in the view that the scheme of the Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made. As we have already pointed out, the objection was not raised in the present case even before the Appellate Income-tax Officer but only before the Appellate Tribunal. The fact that the Tribunal nevertheless thought fit to allow the question to be raised and even included it in the reference to the High Court cannot alter the legal position.

We however proceed to deal with the objection on its merits. Counsel for the respondent alternatively sought to bring the case under clause (5) of S. 64 and for this purpose he wished to refer to an order of the Commissioner of Income-tax assigning this particular assessment case to that particular officer. Counsel for the appellant objected to this document being used at this stage as it

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was not relied on before the High Court or before the Appellate Tribunal. The whole procedure as to the raising of this objection has been irregular but we prefer to leave that document alone. We concur in the view taken by the High Court that the appellant company has been carrying on business in Bombay and that the assessment was therefore rightly made under clause (1) of S. 64 Clause (1) of the Partnership Deed relating to Wallace and Company provides that Wallace Brothers and Co., Ltd., and seven other gentlemen therein named shall carry on business in partnership as merchants and commission agents at Bombay. The deed reserves extensive powers to Wallace Brothers and Co., Ltd., in respect of the business. Nothing has been adduced to show that in spite of these recitals and these powers, Wallace Brothers and Co., Ltd., as one of the partners cannot be regarded as carrying on the business. The appellant stated that it was only a sleeping partner and this is repeated in the reference as well as in the judgment of the High Court. With reference to this statement counsel for the appellant drew our attention to certain observations of Lord Parker in *Mitchell* v. *Egyptian Hotels Limited* (1). They were made by way of explanation of the decision in *Colquhoun* v. *Brooks* (2) and they would only show that the appellant company, if it was only a sleeping partner in Wallace and Company of Bombay, could not be regarded as carrying on that business *in the United Kingdom*.

The appeal fails and is dismissed with costs.

Leave to appeal to His Majesty in Council granted.

A. T. M. *Appeal dismissed:*
Leave to appeal to P. C. granted.

(1) [1915] A. C. 1022 (1037).
(2) 4 App. Cas. 493.

PRESENT: *Sir Patrick Spens, Knight, Chief Justice, Mr. Justice S. Varadachariar and Mr. Justice Zafrulla Khan.*

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v.

THE KING-EMPEROR.

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT LAHORE.]

Sanction—Constitution Act, section 270—Section 408 or section 409, Indian Penal Code (Act XLV of 1860)—Proceedings, if valid without consent.

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Offence under section 408 (Criminal Breach of Trust by a Clerk or Servant) or section 409 (Criminal Breach of Trust by a Public Servant or by Banker, Merchant or Agent), Indian Penal Code, is not one in respect of which the protection of section 270 of the Government of India Act, 1935 can be claimed :

Hori Ram Singh v. *The Crown* (1).

Section 270 of the said Act, which requires that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained, is to be strictly observed.

Federal Court Criminal Appeal No. XIII of 1944.

Sardar Raghbir Singh, Advocate, Federal Court, instructed by *Mr. Ranjit Singh Narula*, Agent, for Appellant.

Sir Brojendra Mitter, Advocate-General of India (Mr. H. K. Bose, Advocate, Federal Court, with him) instructed by *Mr. K. Y. Bhandarkar, Agent. Mr. R. C. Soni, Advocate, Federal Court*, instructed by *Mr. Tarachand Brijmohanlal*, Agent, for Respondent.

The judgment of the Court was delivered by

January, 19.

Spens, C. J.:—In this appeal it has been submitted that the appeal should be dismissed on the ground that under O. XVII, R. 1, it was presented out of time. It has also been questioned whether the order appealed against is a final order within the meaning of those words in S. 205(1) of the Government of India Act, 1935. We do not propose to deal with either of those points, for in any event in our judgment the offence under S. 408 or S. 409 of the Indian Penal Code with which the appellant is charged is not one in respect of which the protection of section 270 of the Government of India Act, 1935, can be claimed.—(See *Hori Ram Singh* v. *The Crown* (1). The appeal is accordingly dismissed.

We would however take this opportunity of saying that in cases to which S. 270 of the Constitution Act applies, the words of the section in our view require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained. Unless this view is strictly observed, the protection intended by the section would be liable to become in practice seriously reduced.

A. T. M. *Appeal dismissed.*

(1) (1939) F. C. R. 159; 72 C. L. J. 340.

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Appeal, *if lies—Application in the suit for sale of certain property mortgaged by the surety in the security bond—Procedure to be followed—Civil Procedure Code (Act V of 1908), sections 2, 27, 144, 145 (6).*

A right of appeal cannot be founded on the ground of unfairness to parties if there be no appeal.

Order in an application in the suit for sale of certain property mortgaged in the security bond by execution of which the property of the judgment debtor attached before judgment was released does not come either under the definition of decree in section 2, section 47 or under section 144 of the Civil Procedure Code.

The proper procedure to be followed by the plaintiff decree-holder is that laid down in clause (c) of section 145 of the Code of Civil Procedure.

Although it is impossible to enforce the security bond as a mortgage, even if the surety has a right to demand that the property referred to be

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sold before any other steps were taken in execution, it can be attached and sold in execution proceedings:

As regards an application to amend the petition and convert it into an application for execution:

Held, that the Court should decide whether it could be considered as an application for execution before the date of conversion.

In such a case the decree-holder must rely on the provisions of section 14 of the Limitation Act, if he can bring his case within it. **Firm Tokani Prosad Kamini Kumar Paul v. Shyamapada Banerjee** ... 118

Appellate Tribunal for income-tax matters—Allowing objection to place of assessment and including in reference to High Court, if alters the legal position; *see Ultra vires* 265

Application to amend petition and to convert it to an application for execution—Court to decide if it can be considered as an application for execution before the date of conversion; *see* Appeal, if lies... ... 118

Application for review, if can be entertained by Federal Court; *see* Review 216

Apportionment case, a valuation case if can be tried by the President of Improvement Tribunal as—; *see* Land Acquisition 105

Arbitration, reference to—Schedule II of Code of Civil Procedure in force—Decree by primary Court in accordance with award—Decree set aside on appeal—Second appeal, if lies; *see* Second appeal 123

Army Act, section 17—Court Martial proceedings against a Captain, if legal; *see* Court Martial 81

——— Act, the Military Code, military offences or proceedings by Court Martial—The words "proceedings civil or criminal" in section 270(1) of the Constitution Act, meaning of; *see* Court Martial 81

Arrears of Putni rent—Putni Regulation (Regulation VIII of 1819) section 17(3)—Provision, if any, when sale proceeds less than arrears; *see* Putni sale 176

——— of revenue deposited by one co-sharer—Contest by defendant No. 1 only—Appeal by him without making other defendants parties—Appeal not competent in their absence; *see* Contribution, suit for 45

Assessment and imposition of income-tax—Method of; *see Ultra vires* ... 265

Assessors' help if may be dispensed with by the President of Improvement Tribunal while deciding a reference under section 18 of the Land Acquisition Act as an apportionment case; *see* Land Acquisition ... 105

Assumption, necessary, and reservations have to be made by Federal Court on reference to it by the Governor-General; *see* Reference 5

Attachment *before judgment—Claim under order 38 rule 8, Civil Procedure Code (Act V of 1908), rejected—If order 21 rule 63 applies—Suit to enforce claim—Limitation—If articles 11 or 13 or 120 applies.*

Order 21 rule 63 of the Civil Procedure Code applies when a claim to a property attached before judgment is either allowed or rejected. A suit should, therefore, be instituted for establishment of one's right to the

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Attachment—*(Contd.)* :

property, when the claim to such property attached before judgment is rejected.

The question of substance is within what time such a suit is to be brought.

Article 13 would not apply as that article does not apply where the order sought to be set aside had been made in a suit.

Article 11 would not be inapplicable because the appellant's claim had been dismissed without investigation, if it is otherwise applicable.

Article 11, however, on a plain reading would not apply as an attachment before judgment is not an attachment in execution of a decree.

If article 11 is not applicable to the case of a claim to property attached before judgment then article 120 would apply with the result that a suit by the unsuccessful claimant or plaintiff would be in time if instituted within six years of the order.

Charges in the Civil Procedure Code and the Limitation Act in respect of relevant provisions at different stages referred to and the case-law reviewed. **Dhan Bibi** *v.* **Mrinalini Ghoshal** 181

Attachment before judgment rejected—Civil Procedure Code, order 21 rule 63—Suit to be instituted ; *see* Attachment before judgment ... 181

Balance of arrears of putni rent over sale proceeds, how to be realised—Zemindar's remedy—Putni Regulation (Regulation VIII of 1819), section 8, 9, 17(3) ; *see* Putni sale 176

Banks, conduct of business of—Constitution Act, Schedule VII, List I Entry 38 ; *see Ultra vires* 133

Benami—The fact that common practice in Bengal for husbands to acquire property in the benami of their wives or that wife is used as *benamidar* does not establish that the property was acquired by husband in *benami* of wife ; *see* Contract Act 59

———The person alleging *benami* to rebut the presumption ; *see* Presumption 248

———, proof of, lies on the person alleging it—Apparent state of things to be presumed real ; *see* Contract Act 59

Bengal Agricultural Debtors Act, Section 52—Saving of limitation ; *see* Limitation 112

Bengal Land Revenue Sales Act, 1868, Section 1—"Tenure" includes "all interest in land"—If includes the interest of a jotedar or raiyat ; *see* Ejectment 173

———————————, Section 12 Exception 3—Current settlement—Revisional settlement ; *see* Ejectment 173

———————————, Sections 12, 14—Raiyati interest ; *see* Ejectment 173

Bengal Money Lenders Act, if comes within "Money lending and money-lenders" ; *see Ultra vires* 220

———————————, Sections 30, 36—If valid and operative ; *see Ultra vires* 133

———————————, Sections 30, 36 and 38, if affect the Negotiable Instruments Act ; *see Ultra vires* 139

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Bengal Money Lenders Act, Sections 30, 36 and 38, if *ultra vires* the provincial legislature as to claims under promissory notes; *see Ultra vires* 139

————————————, Section 36—Reopening of decrees; *see Ultra vires* 220

————————————, Section 36(2)—Judgment-debtor restored to possession on his own account to pay the instalments—Title of the property with decree-holder till the last instalment is paid off; *see* Bengal Money Lenders Act 155

————————————, Section 36 2)—Parties not relegated to their rights and liabilities on the original cause of action—Decree reopened only to the extent necessary to substitute the method of account-taking; *see Ultra vires* 220

————————————, Section 36 (2) (c)—Mesne profits—From what point of time can judgment-debtor claim mesne profits; *see* Bengal Money Lenders Act 155

Bengal Money Lenders Act *(X B. C. of 1940), sections 36 (2) (c) and (e), 34 (1) (a) (ii)—Re-opening of decree and passing of a new decree under section 36(2)—Judgment-debtor restored to possession—Nature of such possession—Title to properties, if remains with the decree-holder—New preliminary decree, if necessary to be passed when all the mortgaged properties were sold—Whether a new preliminary decree is necessary where some of the properties sold—Personal decree, provision for, if and when can be made—Mesne profits—Decree-holder, if accountable for the period between the taking of possession and order for restoration—Liability for period after the order for restoration of possession, during which judgment-debtor was kept out of possession.*

Where a judgment-debtor is restored to possession on the re-opening of a decree under section 36 (2)-(c) of the Bengal Money Lenders' Act he is to be in possession on his own account so that the judgment-debtor may have the means to re-pay the instalments payable under the new decree. The title to property would remain in the decree-holder inspite of the fact that the decree in execution of which he had purchased had been re-opened. The sale becomes void only on the last instalment being paid off.

Accordingly where all the mortgaged properties had been sold and purchased by the decree-holder a new preliminary mortgage decree to be followed on default of payment of instalment, by a new final mortgage decree for sale of the mortgaged properties would be meaningless inasmuch as title to the properties would be with the decree-holder. In such a case there should be an instalment decree for the amount found due with insertion of consequences laid down in section 36 (2) (e) of the Bengal Money Lenders' Act.

In case the judgment-debtor commits default and the amount then due under the new decree exceeds the price at which the properties were purchased, it would be unfair if the right of the mortgagee to get a

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Bengal Money Lenders Act—*(Contd.)* :

personal decree for the balance that would remain after the set off of the price is not reserved.

If all the mortgaged properties had not been sold, there would be the necessity of passing a new preliminary decree for sale of the remaining unsold properties providing that in case of default in the payment of instalment by the judgment-debtor possession of those properties which had been purchased by the decree-holder would be restored to him and he will be able to apply for a new final decree for the unsold properties if the purchase price of the properties previously sold exceeds the balance under the new decree.

A decree-holder purchaser is not accountable to the judgment-debtor for mesne profits from the date at which he had taken possession of the properties and of the order for restoration made at the time of re-opening of the old decree. But the judgment-debtor would be entitled to get mesne profits from the decree-holder purchaser if he is kept out of possession inspite of order under clause (c) of section 36(2) of the Bengal Money Lenders Act, although it may be by obtaining a stay order in the course of an appeal from the order re-opening the decree or from the new decree. **Jadu Nath Roy** *v.* **Kshitish Chandra Acharji Chowdhury** 155

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, if repugnant to Code of Civil Procedure ; *see Ultra vires* 87

operation of, if falls under Entry 4 List III of the 7th schedule to the Constitution Act and is saved by section 4(1) of the Code of Civil Procedure ; *see Ultra vires* 87

Section 3—Stay of execution proceedings ; *see Ultra vires* 87

Section 3—"Tenant", connotation of ; *see Ultra vires* 87

Bengal Tenancy Act, Section 168A—Bar to execution of decree—Question to be decided in execution—No ground for refusing to pass a decree ; *see* Putni sale 176

Bequest—Absolute power of transfer given to Hindu widow—Hindu Law ; *see* Hindu Law 90

Breach of covenant—Lessor's remedy lies in claim of forfeiture against lessee ; *see* Lease 36

——— of covenant by lessee not to make permanent or periodic settlement—Cause of action—Covenant a restrictive one only regarding sub-lease and not one to pay rent ; *see* Lease 36

Cadastral Survey—Remark that entry of etmadar not binding on government—Revisional Survey—The interest is that of tenure-holder ; *see* Ejectment 173

——— record upto 1925 if admissible in evidence as regards the asme status continuing after that year ; *see* Ejectment 173

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Canadian doctrine of "occupied field"—Conflict between provincial and central legislation—Extension of principle in section 107 of the Constitution Act ; *see Ultra vires* 220

Captain—Court Martial proceedings under section 17 of Army Act, if legal ; *see* Court Martial 81

"Carrying on business", sleeping partner if can be said to be, there within the meaning of section 64(5) of the Indian Income-tax Act ; *see Ultra vires* 265

Cause of action accrued on the breach of covenant that the lessee was not entitled to grant sub-lease at a rate of rent less than what is settled with him—The covenant a restrictive one regarding sub-lease and not one to pay rent ; *see* Lease 36

——— arising before the subsequent statute came into force—Suit, if to be governed by the provisions of the statute—Intention of Legislature ; *see* Rent, suit for 1

———, parties not relegated to their rights and liabilities on the original—Bengal Money Lenders Act, section 36(2)—Decree reopened only to the extent necessary to substitute the method of account-taking ; *see Ultra vires* 220

Caution to be exercised for use of the advisory jurisdiction conferred even under law—Prejudice to the rights of future litigants ; *see* Reference ... 5

Central Government, if "an authority higher than a Provincial Government ; *see* Sanction 135

Charge of contravening freezing order, if quite distinct and separate from charge of making a promise, never intending to keep it, to escape consequences of the first offence ; *see* Defence of India Act 189

Civil Procedure Code—Repugnancy—Bengal Non-Agricultural Tenancy (Temporary Provisions) Act ; *see Ultra vires* 87

———, Sections 2, 47, 144—Order by execution of which the judgment-debtor's property is released from attachment, if appealable ; *see* Appeal, if lies 118

———, Section 4(1), if controls order 21 rule 24 ; *see Ultra vires* 87

———, Section 11—*Res judicata*—Point in issue must relate to right of parties to suit—Determination of those rights may depend on determination of facts and points of law ; *see* Contract Act... 59

———, Section 48 (1) (b)—"Subsequent order", interpretation of—Order of executing Court dispensing with the execution case on the basis of compromise if a "subsequent order" ; *see* Compromise 100

———, Section 66—Confined to suit for possession only ; *see* Presumption 248

———, Section 115—Revision—Incompetent reference to arbitration and decree in accordance with award set aside on appeal—No second appeal ; *see* Second appeal 123

———, Order 21 rule 24 if to be read subject to section 4(1) ; *see Ultra vires* 87

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Civil Procedure Code, Order 21 rule 63—Attachment before judgment rejected—Suit to be instituted ; *see* Attachment before judgment ... 181

——— ——— ———, Order 21 rules 67, 69, 70 ; *see* Execution ... 129

——— ——— ———, Order 21 rule 69—Date and hour of sale not specified by Court—If a material irregularity ; *see* Sale 168

——— ——— ———, Order 21 rule 90—Setting aside a sale in its entirety—Sale if can be set aside in part by a fractional share-holder of the property for material irregularity ; *see* Sale 168

——— ——— ———, Order 38 rule 8—Claim rejected—Remedy ; *see* Attachment before judgment 181

——— ——— ———, Order 41 rule 23—One order—Whole suit not disposed of upon preliminary point—Court decided several issues on merits except for one issue for which lower appellate Court remanded the case—Order made under inherent power of Court could be attacked in appeal from decree ; *see* Mesne profits 229

——— ——— ———, Schedule II in force—Reference to arbitration—Decree by primary Court in accordance with award set aside on appeal—Second appeal, if lies ; *see* Second appeal 123

Claim for recovery of arrears of rent filed within the pre-existing period of limitation but beyond the period of limitation reduced under the subsequent statute, if barred ; *see* Rent, suit for 1

Claims under promissory note—Bengal Money Lenders Act, sections 30, 36, 38 ; *see Ultra vires* 139

Code, Military, Army Act, military offences or Court Martial proceedings, if has any bearing on the words "proceedings civil or criminal" in section 270 (1) of Constitution Act ; *see* Court Martial 81

Collector, notice to, under section 20 of the Land Acquisition Act, if can be dispensed with by the President of Improvement Tribunal while hearing a reference under section 18 as an apportionment case ; *see* Land Acquisition 105

——— — to assess fair rent for patni—The basis of annual value at the time of resumption in 1899 ; *see Mesne profits* 229

Commission—Broker introducing buyer to seller entitled to usual commission when it results in contracts ; *see* Contract 49

Compensation to owner of dominant tenement how to be made ; *see* Land Acquisition 105

Complainant inducing statement by accused—"Person in authority"—Evidence Act, section 24 ; *see* Evidence 149

Compromise—*Compromise for instalment payment in execution proceedings—No new decree substituted—Default in instalment—Limitation for fresh execution—Section 48, sub-section (1) clause (b), Civil Procedure Code (Act V of 1908).*

In the proceedings for the execution of an *ex parte* decree dated the 26th May, 1927, a compromise was entered into between the decree-holder and the judgment-debtor. By the compromise dated the 20th July, 1934, the decretal dues were adjusted at a particular sum which was to be paid in nine instalments, in default of any one of which the decree-holder

PAGE.

Compromise—*(Contd.)*:

would be entitled to recover the entire decretal amount, and certain properties of the judgment-debtor were made security for decretal amount. The compromise was recorded in the execution proceedings and the execution case was dismissed. The judgment debtor having failed to pay the fifth instalment, an execution case was started on the 9th September, 1941, more than 12 years after the passing of the original decree. It was contended on behalf of the judgment-debtor that the execution case was time-barred as it was started more than 12 years after the date of the original decree. It was argued on behalf of the decree-holder that limitation would run from the date upon which the judgment debtor defaulted in the payment of the fifth instalment and the execution being within 12 years from that date was within time, according to clause (b), sub-section (1), section 48 of the Code of Civil Procedure:

Held, (1) that the application for execution was not barred by limitation;

(2) that the intention of the parties was that the original decree was to be executed in the event of default of any instalment and the provision in the compromise petition creating a charge on certain properties made no difference in this respect;

(3) that the order of the executing court dispensing with the execution case on the basis of the compromise is a "subsequent order" within the meaning of clause (b), sub-section (1), section 48 of the Code of Civil Procedure and the limitation for fresh application for execution is to run from the date of default in the payment of any instalment. **Narendra Nath Roy Choudhury** *v.* **Heramba Chandra Roy Choudhury** 100

Compromise for instalment payment in execution proceedings—Default in one instalment—Limitation; *see* Compromise 110

Conduct of the parties and the payment of the price by the person are the two factors relevant for determination of benami; *see* Contract Act ... 59

Conflict between Provincial and Central enactment—Both *intra vires* of respective legislature—Rule of severability need not be invoked to uphold validity of impugned Act—Doctrine of repugnancy and not of *ultra vires* applicable; *see Ultra vires* 220

——— between Provincial and Central legislation—Constitution Act section 107—Extention of the principle—Canadian doctrine of "occupied field"; *see Ultra vires* 220

Consolidated rent, what is—Grant of a sublease at a rate of rent less than that granted to the lessee inspite of covenant to the contrary when the rent in the head lease was a lump sum, if amounts to a breach of covenant; *see* Lease 36

Constitution Act, 1935, Section 99—Construction of—List in Schedule VII thereunder; *see* Reference 5

———————, Section 100(1)—Prohibition imposed on provincial legislature; *see Ultra vires* 139

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Constitution Act, 1935, Section 104—Notification under—Addition to the Lists in Schedule VII—Governor-General to take opinion of Federal Court before issuing notification—Reference to be made before introduction of legislatiou ; *see* Reference 5

————————, Section 107—Extension of principle in conflict between Provincial and Central legislation ; *see Ultra vires* 220

————————, section 213—Questions "likely to arise" in future—Governor-General, if can make reference to Federal Court ; *see* Reference 5

————————, Section 270—Offence under section 408 or 409 Indian Penal Code—Protection, if any ; *see* Sanction 275

————————, Section 270—Proceedings instituted before sanction, if wholly void—New proceedings, if required to be started afresh after sanction ; *see* Sanction 275

————————, Section 270—Sanction ; *see* Sanction 275

————————, Section 270(1)—Court Martial proceedings, if criminal proceedings ; *see* Court Martial 81

————————, Schedule VII—Lists under—Addition to such lists under—Addition to such lists by notifications under section 104—Governor-General to take opinion of Federal Court before issuing notification—Reference to be made before introduction of legislation ; *see* Reference 5

————————, Schedule VII List I Entry No. 28—Bengal Money Lenders Act, sections 30, 36 and 38 ; *see Ultra vires* 139

————————, Schedule VII List I Entry No. 38—Limited to laws affecting conduct of business of banks *qua* banks ; *see Ultra vires* ... 133

————————, Schedule VII, List I Entry No. 56—Interpretation of the word "succession" ; *see* Reference 5

————————, Schedule VII, List II—"Money-lending and money-lenders"—Enactment, if *ultra vires* the Provincial legislature ; *see Ultra vires* 220

————————, Schedule VII List II, if covers levy of Estate Duty ; *see* Reference 5

————————, Schedule VII List III Entry No. 4 if covers the operation of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act—Code of Civil Procedure, section 4(1) ; *see Ultra vires* ... 87

————————, Schedule VII List III Entry No. 10—Contracts—Bengal Money Lenders Act, sections 30, 36 and 38 ; *see Ultra vires* ... 139

Construction, Federal Court cannot base its decision on, solely on results ; *see* Court Martial 81

———————— of section 99 of the Constitution Act, 1935 and not of the list in Schedule VII determines the question viz. "The situs of the moveable property shall be such as may be specified in the law or prescribed by rules made under the law ; *see* Reference 5

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Contract—*Brokerage—Employment for introduction to prospective buyer—Subsequent contract, if fruit of introduction—Witness, credibility of—Probability, estimate of.*

A broker who is employed by a seller to introduce him to a prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have as a result of the introduction been brought into business relationship by means of contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit not of the introduction, but of the satisfactory business relationship which the introduction established.

A trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought, or with reckless glibness. He alone could form a reliable opinion as to whether the plaintiff had emerged with credit from cross-examination.

As a rule it is wrong to justify an estimate of probability by an ultimate issue of events. **Valarshak Seth Apcar v. The Standard Coal Company, Ltd.** 49

——— of sale—Owner of property—Criminal breach of trust—Criminal misappropriation ; *see* Trust, criminal breach of 126

——— providing for recovery of balance of arrears of pufni rent over sale proceeds, if runs with the land and consistent with Putni Regulations ; *see* Putni sale 176

Contract Act—*Re-imbursement—Co-debtors—Principle stated—Contract Act (IX of 1872), section 69—'Bound by law to pay'—Equity—Benami transaction—Proof—Civil Procedure Code (Act V of 1908), section 11.*

The principles applicable to a suit for contribution between two co-debtors are applicable to a suit for re-imbursement as the only difference between them is that in the former case one discharges his as well as another's liability and in the latter case he discharges the liability which is wholly the other's not voluntarily but under conditions which give him legal right to recoup himself.

Those principles are : (A) The release of one of the debtors by the creditor does not prevent the other debtor who has satisfied the debt from claiming contribution from the released debtor.

(B) The dismissal of the creditor's suit against one of his co-debtors will not bar the debtor against whom the decree was passed from claiming contribution from his co-debtor against whom the suit was dismissed, if he either satisfied the decree or the decree was satisfied by execution levied against his property.

The words "bound by law to pay" in section 69 of the Indian Contract Act include not only personal liability of the "other" but also liability on his property even when he was under no personal liability to pay.

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Contract Act—*(Contd.)*:

Statutory provisions cannot be controlled by or whittled down by the general principles of equity, justice and good conscience. Those principles can have application in India on the field outside statutory provisions. If there is a statutory provision on the subject, the plaintiff would succeed or fail according as his case satisfies or fails to satisfy the statutory requirements. If his case comes within section 69 of the Indian Contract Act he is entitled to succeed and cannot be denied relief by taking the aid of general maxims of equity.

In order to satisfy the plea of *res judicata* under section 11 of the Civil Procedure Code, the point in issue must relate to the rights of parties to the suit. The determination of those rights may depend upon the determination of facts as well as on points of law. What the rule of *res judicata* bars is the re-agitation between the self-same parties or their privies, of the self-same issue, which was directly and substantially in issue between them in the previous suit.

The apparent state of things must be presumed to be real and he who alleges *benami* must in the first instance adduce such evidence as would rebut that presumption.

Where the parties are husband and wife, the fact of possession of property and of title-deeds would afford no certain criterion on the question of *benami*. The fact that rent receipts were issued in the name of wife or that she figured as plaintiff in rent suits against the tenants or that the record of rights showed her name as the owner, would not also be of much importance, for those circumstances would be in accordance with *benami* usage. The apparent state of thing would ordinarily be kept up. The material point for consideration would be as to who paid the price and the conduct of the parties The fact that it is a common practice in Bengal for husbands to acquire property in the *benami* of their wives and that husband had in the past employed his wife as *benamdar*, would be matters for consideration, but by themselves they would not establish that the property was acquired by husband in the *benami* of his wife. **Joy Chand Serogi** *v.* **Dole Gobind Das** ... 59

Contribution, claim of, by the debtor satisfying the debt against a debtor released by the creditor, if barred ; *see* Contract Act 59

————, difference between re-imbursement and——— ; *see* Contract Act 59

————, *suit for—Appeal by one of the defendants—Other defendants, if necessary parties—Appealing defendant, if entitled to any relief—Cross-objection against co-respondent.*

The plaintiff in a suit for contribution deposited the arrears of revenue due on a certain Noabad Taluk in order to save it from being sold. He claimed contribution on the basis of the shares owned by himself and the various defendants. The defendant No. 1 alone contested the suit and his case was that contribution should be levied not on the basis of the shares of the parties but upon the assets of the last settlement.

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Contribution—*(Contd.)*:

The Trial Court gave the plaintiff a decree as claimed. Defendant No. 1 alone appealed and the other defendants were not made parties to the appeal. The lower appellate Court accepted the contention of defendant No. 1 and remanded the suit :

Held, (A) that the other defendants were necessary parties and (B) that defendant No. 1 could not get any relief in the lower appellate Court in the absence of the other defendants.

Though a cross-objection can usually be taken against an appellant, in certain cases such an objection can be taken against a co-respondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the co-respondent. **The Hon'ble Maharaja Sris Chandra Nandi v. Mahammed Ibrahim Meah, Mutwali to the Estate of Naju Meah** 45

Contribution suit, if lies against a co-debtor by another debtor who satisfied the creditor's decree—Creditor's suit dismissed against the co-debtor ; *see* Contract Act 59

Conversion, application for, of petition to application for execution—Court to decide if it can be considered as an application for execution before the date of conversion ; *see* Appeal, if lies 118

——— of petition to application for execution—Limitation Act, section 14 ; *see* Appeal, if lies 118

Co-respondent—Cross-objection against him—When can be made ; *see* Contribution, suit for 45

Counsel, oral submission by, supplementing the reference to Federal Court, should not be allowed ; *see* Reference 5

Court, executing, informed of the agreement for continuing the sale from day to day till date of disposal—Order by executing Court made after the date fixed for sale—Sale on last date fixed by agreement on dismissal of appeal, if illegal or irregular—Necessity for fresh sale proclamation ; *see* Execution 129

——— not specifying the date and hour of sale—Code of Civil Procedure, order 21 rule 69—If a material irregularity ; *see* Sale 168

———, order of, that sale to be held after Misc. case disposed of—If a material irregularity ; *see* Sale 168

——— to decide if the petition sought to be converted into an application for execution can be so considered before conversion ; *see* Appeal, if lies ... 118

———, trial, passes a decree in accordance with award on reference to arbitration while Schedule II of Civil Procedure Code still in force—Decree set aside on appeal—Second appeal, if lies ; *see* Second appeal ... 123

Court Martial—*Court Martial Proceedings—Constitution Act, section 270 (1)—'Criminal'—Section, words of, plain—Result.*

The Court Martial proceedings are not criminal proceedings within the meaning of section 270(1) of the Constitution Act.

The words 'proceedings civil or criminal' in section 270(1) of the Constitution Act have been used in their ordinary common meaning without

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Court Martial—*(Contd.)*:

any reference to the Army Act, the Military Code, military offences or proceedings by Courts Martial.

If words of a section are plain and can bear only one meaning in law, results are not a matter for the Federal Court and in some contexts the phrase criminal proceedings may include Court Martial proceedings.

Hence a Court Martial proceeding was legally and properly instituted against a Captain holding the temporary rank of Major in the Royal Engineers and attached to No. 1 Works Service (E & M) Group, I. E. for acts under section 17 of the Army Act alleged to be committed by him in the execution or purported execution of his duty as a servant of the Crown in India without the previous consent of the Governor-General in his discretion.

The Federal Court did not accept as a help in construing section 270 of the Constitution Act logical considerations for treating all Court Martial proceedings under the Army Act as criminal proceedings.

The Federal Court cannot base its decision on construction solely on results. **A. W. Meads v The King-Emperor** 81

Court Martial proceedings are not criminal proceedings within the meaning of section 270(1) of the Constitution Act ; *see* Court Martial ... 81

Covenant, breach of—Head lease mentions a lump sum as rent but contains a covenant that sub-lease at a rate of rent less than that granted in the head-lease cannot be given—Sub-lease at a rate of rent less than that granted to the lessee, if amounts to breach of covenant ; *see* Lease ... 36

——— by lessee not to make permanent or periodic settlement of land at a rate of rent less than that settled with him etc. the breach whereof would give rise to cause of action for recovery of khas possession, was a restrictive covenant only regarding sub-lease and not one to pay rent ; *see* Lease 36

———, restrictive—Right of action—Injunction to restrain the breach—Lessor may claim forfeiture against lessee upon the breach of the covenant ; *see* Lease 36

Covenant running with the land—Contract for recovery of balance of arrears of putni rent over sale proceeds, if a——— ; *see* Putni sale ... 176

Creditor releasing one debtor does not bar the claim of contribution by another debtor against the released debtor ; *see* Contract Act ... 59

Criminal breach of trust—Criminal misappropriation—Owner of property—Contract of sale ; *see* Trust, criminal breach of 126

——— misappropriation—Criminal breach of trust—Owner of property—Contract of sale ; *see* Trust, criminal breach of 126

Criminal Procedure Code, Section 197—"An authority higher than a Provincial Government", interpretation of ; *see* Sanction 135

———————, Section 236—Charging the accused in the alternative, if legitimate ; *see* Defence of India Act 189

———————, Section 549 (1) (2)—Delivery of person liable to be tried under Court Martial charged under section 41 of the Indian Army Act ; *see Habeas corpus* 213

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Criminal proceedings—Court Martial proceedings, if criminal proceedings—Constitution Act, 1935, section 270 (1) ; *see* Court Martial 81

Criterion for the determination of *benami*—Possession of title-deeds or issue of rent-receipts by a wife would afford no certain criterion for determination of *benami* ; *see* Contract Act 59

Cross-objection—Usually against appellant but against co-respondent when relief prayed against him ; *see* Contribution, suit for 45

Debtors, liability of—Bengal Money Lenders Act ; *see Ultra vires* ... 133

Decree, dues under, must be paid off before the title of decree-holder is extinguished when the decree is reopened under section 36 (2) of the Bengal Money Lenders Act ; *see* Bengal Money Lenders Act... ... 155

——, execution of—Sale of the properties separately in separate lots—Sale may be upheld for some lots and set aside for others ; *see* Sale ... 168

— for khas possession subject to liability for rent—If a constructive trust for rent ; *see Mesne profits* 229

—, refusal to pass—Bengal Tenancy Act, section 168A—Question as to whether section 168 A a bar to execution to be decided in the execution ; *see* Putni sale 176

— of creditor satisfied by another debtor—Suit was dismissed as against a co-debtor—Contribution suit if lies against the co-debtor ; *see* Contract Act 59

——— passed in ejectment suit against a person who, if a "tenant" under section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act ; *see Ultra vires* 87

— re-opened only to the extent necessary to substitute the method of account taking—Bengal Money Lenders Act, section 36(2) ; *see Ultra vires* 220

——— re-opened under section 36 (2) of the Bengal Money Lenders Act—A new preliminary mortgage decree followed by a new final mortgage decree for sale if to be passed or an instalment decree for the amount to be passed ; *see* Bengal Money Lenders Act 155

Decrees, re-opening—Bengal Money Lenders Act, section 36 ; *see Ultra vires* 220

Decree-holder purchaser—Mesne profits—Judgment-debtor, right of—At what point of time to get ; *see* Bengal Money Lenders Act 155

——— retains title to property though judgment-debtor is restored to possession on re-opening of decree under section 36(2) of the Bengal Money Lenders Act till the decretal dues are paid off ; *see* Bengal Money Lenders Act 155

Deduction from "full market value" of the servient tenement if less than value of easement or restrictive covenant, then Government to pay excess to owner of dominant tenement ; *see* Land Acquisition ... 105

Default by judgment-debtor to pay instalment—Amount then due exceed the purchase-price of the property—Mortgagee to get a personal decree for the balance ; *see* Bengal Money Lenders Act 155

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Defence of India Act—*Violating rules framed under—Contravening freezing order—Goods wrongfully disposed of—Charge against partner of the firm—Act likely to mislead in the dischage of lawful function—Defence of India Rules, Rule 75 A (7)—'Disposal'. meaning of—Property in goods—Act of disposal—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), section 236—Proceedings, if void for misjoinder—Evidence showing different offence—Contravention of order under Rule 75A taking place in 1941 and prosecution started in September, 1942—Provision for punishment for breach—Order issued under Rule 83 (3a) then in force—Punishable under sub-rule (4)—Order under rule 83 (3a), if can be issued on a firm—Defence of India Rules, rule 119—Statutory offence—Proof of guilt*—Ultra vires.

The word 'disposal' in Rule 75 A(7) of the Defence of India Rules does not mean any actual removal or delivery by actual movement of the goods.

The question whether property in the goods pass by handing over of the delivery order or not depends for its solution on the intention of the parties, as to whether the property was to pass before payment of money or not. Even assuming that the intention was that the property in the goods should pass with the delivery order, the subsequent acceptance of money by the vendor is another act of disposal, as would also have been actual delivery of the goods by him if he had allowed the purchaser to remove the goods.

If the prosecution case was that the accused misled the authorities by making a promise, which he never meant to keep, in order to get out of the difficulty created by a contravention of the freezing order having been made, then there was a misjoinder of charges. The latter offence was entirely separate from the former, though arising out of it.

It is quite legitimate for the prosecution under section 236 of the Code of Criminal Procedure to charge the accused in the alternative either that they had delivered the goods, that is to say disposed of them in contravention of the order or had falsely informed the authorities that they had done so.

The fact that in argument at a late stage the prosecution sought to meet a defence argument by contending that the evidence proved a different charge in no sense alternative to the charge under Rule 75A of the India Defence Rules cannot make the proceedings void on the ground of misjoinder.

Though the contravention took place in December, 1941 and the prosecution was started in September, 1942, the accused will be punishable under the rules as stood in December, 1941. Hence when the accused was tried for a contravention in December, 1941 of an order made under Rule 83 (3a) then in force, he would be punishable under Rule 83 (3a) as then stood.

An order under Rule 83 (3a) can be issued on a firm not being an entity but a partnership registered under the Indian Partnership Act, the firm meaning the partners collectively.

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Defence of India Act—*(Contd.)*:

Rule 119 of the Defence of India Rules relates to the service of notice. The provision in respect of a firm and company is for publication to them as a 'class of persons'. Rule 119 as it stood in December, 1911, provided a method for informing a firm of an order affecting it.

The Common Law doctrine as to the person who is to prove innocence, has no application to statutory offences of the type created by rule 5 of the Defence of India Rules as originally framed read with other rules.

As regards the Defence of India Act, the principle of *Queen* v. *Burah* and the later cases applies. Section 102 of the Government of India Act so far from showing any intention to restrict the legislative power for the emergency of war deliberately widens them.

Defence of India Act is *intra vires* the Central Legislature. **Superintendent and Remembrancer of Legal Affairs Bengal** *v.* **D. B. Futnani & A. V. Toshi** 189

Defence of India Act, if *intra vires* the Central Legislature ; *see* Defence of India Act 189

————————, Section 102—Scope of ; *see* Defence of India Act ... 189

Defence of India Rules, Rule 75 A(7)—"Disposal", meaning of ; *see* Defence of India Act 189

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Definition, easement if comes within the, of land as given in section 3 of the Land Acquisition Act ; *see* Land Acquisition 105

Delivery order, handing over of—Property in goods if passes—Subsequent acceptance of money by vendor is another act of disposal ; *see* Defence of India Act 189

Demeanour and credibility of witness can be testified by trial Judge only ; *see* Contract 49

Determination of the right of parties to suit raised in the point in issue may depend on facts and law—*Res judicata* ; *see* Contract Act ... 59

Devolution of an estate of Hindu widow having absolute right of transfer ; *see* Hindu Law 90

Difference between a Hindu widow's estate and an estate of Hindu widow having absolute right of transfer ; *see* Hindu Law 90

—————— between contribution and re-imbursement ; *see* Contract Act ... 59

—————— between succession and Estate Duty ; *see* Reference 5

Dismissal of creditor's suit against a co-debtor—Another debtor had to satisfy the creditor's decree—Contribution suit if lies against the co-debtor ; *see* Contract Act 5

Doctrine of repugnancy and not of *ultra vires* applicable—Conflict between Provincial and Central enactment ; *see Ultra vires* 220

Document, class of, on which money lent—Regulation and control of money-lending, if *ultra vires* the provincial legislature ; *see Ultra vires* 220

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Dominant tenement, right of owners of, must be valued and he must be compensated with that sum on acquisition by Government; *see* Land Acquisition 105

Easement, if comes within the definition of land as given in section 3 of the Land Acquisition Act; *see* Land Acquisition 105

— ———, valuation of, how to be made; *see* Land Acquisition 105

Ejectment—*Mesne profits—Lessee—Lease by mortgagor of an English mortgage—Transfer of Property Act (IV of 1882, as amended), section 65A—Lessee's possession, if wrongful.*

The purchaser in mortgage sale acquires the property as it existed at the date of the sale discharged of the mortgage lien but subject to the rights of those who were not made parties to the suit and can sue for possession subject to the exercise of right of redemption by such persons. The position would be different if the equity of redemption was wholly unrepresented in the mortgage suit.

A mortgaged certain properties on 23rd December, 1920, in the form of an English mortgage to B, the plaintiff's father. On June 15, 1932, A granted a lease of the property in suit, to defendant No. 1 for a term of 10 years. B obtained a decree on his English mortgage and in execution of t is decree purchased the mortgaged properties including the property in suit on 14th March, 1936. After purchase, B obtained symbolical possession of the properties in due course but on attempting to take actual possession he discovered that defendant No. 1 was in possession of the disputed property on the basis of the lease which being in contravention of section 65A of the Transfer of Porperty Act was not binding on the mortgagee. After B's death, the plaintiff, his son and legal representative, instituted the present suit praying for ejectment of defendant No. 1 from the property in suit as a trespasser and for mesne profits from him from the date of B's death till the date of actual delivery of possession:

Held, that the plaintiff was not entitled to get mesne profits as the possession of defendant No 1 though under a lease not binding on the mortgagee, was not wrongful till the expiry of lease on June 15, 1942.

Hemanta Kumar Bose v. Jitendra Nath Pal 114

——— ——— Mesne profits—Lessee—Position of; *see* Ejectment ... 114

——— ——— *The Bengal Land Revenue Sales Act, 1868 (Act VII B. C. of 1868), Sections 12 exception 3, and 14—Note in the Remark Column of Cadastral Survey record—'Not binding on Government'—Tenure created or recognised by settlement proceeding'—After effect of entry in Cadastral Survey record as to status of the person—'Current settlement'—'Tenure', if includes the interest of a jotedar or raiyat.*

In 1898, defendant was recorded as etmamdar. A note was added in the remark column of the Cadastral Survey record against this entry that this was not binding on Government. The settlement under cadastral survey was for the period ending in 1925. In the revisional survey of Chittagong held in 1930 he was recorded as a jotedar;

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Ejectment—*(Contd.)* :

Held, that the meaning of the remark made in the cadastral survey record was that although the tenancy was recorded as a tenure, it was not to be treated as a tenure created or recognised by the settlement proceedings. The note did not in any way weaken the effect of the entry that the interest was that of a tenure-holder.

The mere fact that the settlement was for the period up to 1925 would not make the cadastral survey record inadmissible in evidence on the question as to whether defendant's status as recorded therein continue to be such or not after that year.

An entry in mortgage deed executed in 1921 that the defendant was an etmadar was good evidence as to his status for a subsequent period though the settlement under cadastral survey was for the period ending in 1925.

The 'current settlement' as mentioned in exception 3 to section 12 of The Bengal Land Revenue Sales Act, 1868, is in the present case the revisional settlement held in 1930 wherein the defendant was wrongly recorded as a jotedar.

Though the tenure as defined in section 1 of the Bengal Revenue Sales Act, 1868, includes "all interest in land", it does not include the interest of a jotedar or raiyat.

The interest referred to as "tenures" in the various exceptions under section 12 of The Bengal Land Revenue Sales Act, 1868, is distinct from 'raiyati' interests which are separately dealt with in section 14. **Abdul Karim Master** *v.* **Raj Chandra Ghosh** 173

Ejectment, decree in, passed against a person who, if a "tenant" under section 3 of The Non-Agricultural Tenancy (Temporary Provisions) Act; *see Ultra vires* 87

Elucidation of the scope of the charging section—Perusal of machinery section may often be useful and sometimes even necessary; *see* Reference 5

English Law, levy of Estate Duty as in—Federal legislature, if has power to make law providing the levy thereof; *see* Reference 5

————, levy of Estate Duty as in, if a matter included in any of the Lists in Schedule VII to the Government of India Act, 1935; *see* Reference 5

Entry of etmadar in cadastral survey—If a tenure-holder; *see* Ejectment ... 173

Equity, justice and good conscience do not control the statutory provisions; *see* Contract Act 59

Estate Duty and succession, difference between; *see* Reference 5

————, levy of, as in English Law—Federal Legislature, if has power to make law providing for the levy thereof; *see* Reference ... 5

————, levy of, as in English Law, if a matter included in any of the Lists in Schedule VII to the Government of India Act, 1935; *see* Reference 5

————, proposed to be levied, if covered in List II of Schedule VII; *see* Reference 5

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Estimate of probability, if it is wrong to justify, by an ultimate issue of events ; *see* Contract 49

Etmadar, interpretation of—Cadastral survey—Remark that entry of etmadar not binding on Government—Revisional survey—The interest is that of a tenure-holder ; *see* Ejectment 173

Exceptions, one of the, of the rule that cross-objection can be made against appellant only is when the question in appeal cannot be disposed of in absence of co-respondent and in that case cross-objection against co-respondent is allowed ; *see* Contribution, suit for 45

Execution—*Code of Civil Procedure (Act V of 1908), Order 21, Rule, 67, 69, 70—Sale fixed on a certain date continued from day to day—Application for stay of sale on ground of insolvency dismissed—Appeal to District Judge and interim stay—Agreement for continuing the sale from day to day till the date of disposal—Executing Court informed of the agreement and costs put in for continuing the sale—Order by Executing Court made after the date fixed for sale—Sale on the last date fixed by agreement on dismissal of appeal, if illegal or irregular—Necessity for fresh sale proclamation.*

The 1st appellant obtained a decree against the respondents and in an execution proceeding the date of sale was fixed on the 8th July but as no bid was forthcoming on that date, the sale was by order of Court continued from day to day down to 29th July and on that date an order was made directing the sale to be continued till the 5th August. Meanwhile the respondents made an unsuccessful application to the Executing Court to stay the sale on the ground of insolvency but the application having been dismissed an appeal was filed on the 2nd August to the District Judge. Before the Court of District Judge an agreement was entered into between the Advocates of parties with regard to application for an interim stay to the effect that the sale would be continued till the 12th August on which date the appeal was due to be heard. On the 5th August the decree-holder informed the Executing Court of the agreement and paid the necessary fee for continuing the sale till the 12th August. No order for continuance of the sale was made on the 5th August (date fixed for the sale) but on the 8th August the executing Court made an order that the sale be continued till the 12th August. On the 12th August, the appeal was dismissed and the property was sold at a fair price to the 2nd appellant :

Held (1) That in view of the agreement of the 3rd August and the order of 8th August which effectively continued the sale till the 12th August there was no material irregularity in the proceeding still less an illegality.

(2) That no fresh proclamation was necessary as the sale continued from day to day and was never adjourned. **Venkataramana Ayyar v. Natesa Pillai** 129

———, application for conversion of petition—Court to decide if the petition be considered as an application for execution before conversion ; *see* Appeal, if lies 118

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Execution of decree—Sale of the properties separately in separate lots—Sale may be set aside regarding some lots and upheld regarding others; *see* Sale 168

——— proceedings if can be stayed under section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act; *see Ultra vires* ... 87

Executive Government empowered under statute to fix by notification the date on which the Act to come in operation—Inference as to intention of legislature to apply it to suits the cause of action of which arose before it came into force; *see* Rent, suit for 1

Exercise of advisory jurisdiction even under the provisions of law may result in prejudice to the rights of future litigants and should be cautiously made; *see* Reference 5

Express enactment or necessary intentment, in absence of, a right in existence if can be affected retrospectively by the provisions of a statute passed subsequently; *see* Rent, suit for 1

Evidence—Admissibility—Cadastral survey record upto 1925—Entry of status—If admissible as regards same status continuing after that year; *see* Ejectment 173

———Admissibility—Mortgage deed containing recital of status as etmadar—If good evidence regarding the same status for subsequent period; *see* Ejectment 173

——— Admissibility—Statement by a person to prosecutor but not examined as a witness, if admissible; *see* Evidence 149

———*Defence of India Rules 1939, rule 81(4)—Bengal Essential Food Stuffs Antihoarding Order of 1944, clause 4—Indian Evidence Act (I of 1872), sections 32, 33—Admissibility of evidence—Section 24 of Indian Evidence Act, "person in authority", if includes the prosecutor.*

Statement made to the prosecutor by a person without his being examined as a witness is not admissible either under the provisions of section 32 or section 33 of the Evidence Act.

Once the complainant discloses that the statement of the accused was procured by him by inducement, it is the duty of the prosecution to show by re-examination or otherwise that the complainant was not a person in authority within the meaning of section 24 of the Evidence Act.

The words "person in authority" in section 24 of the Evidence Act include the prosecutor in the circumstances of the present case. **Gunga Prosad Gupta v. The Emperor** 149

———must be adduced to prove *benami*—Apparent state of things to be presumed to be real; *see* Contract Act 59

Evidence Act, Sections 32, 33—Statement made to the prosecutor by a person without his being examined as a witness, if admissible; *see* Evidence 149

Failure of Small Causes Court to send the decree passed by it to the executing Court in time, if an irregularity; *see* Irregularity 110

Federal Court, if can entertain application for review of its own judgment; *see* Review 216

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Federal Court cannot base its decision on construction solely on results ; *see* Court Martial 81

——— ——— not to insist on the inexpediency of advisory jurisdiction conferred by Parliament under section 213 of the Constitution Act ; *see* Reference 5

——— ——— on reference by the Governor-General has to make certain necessary assumptions and reservations ; *see* Reference 5

——— ———, opinion of, to be taken by the Governor-General before issuing notification under section 104 of the Constitution Act, 1935 for making addition to the lists under Schedule VII—Reference to be made before introduction of legislation ; *see* Reference 5

———, reference to, by Governor-General to be accompanied with draft notification to be issued under section 104 and a draft bill to be introduced ; *see* Reference 5

———, reference to, on questions relating to future legislation if can be made by Governor-General—Constitution Act, 1935 section 213 ; *see* Reference 5

———, reference to, should be complete in itself and should not be left to be supplemented by the counsel by oral submissions; *see* Reference 5

——— Judges—Direct forwarding of further matter by client not placed by counsel—Reconsideration, if can be done ; *see* Leave to appeal 217

Federal legislature has no power to make a law providing for levy of Estate Duty as in English Law ; *see* Reference 5

Firm—Connotation of ; *see* Defence of India Act 189

———Defence of India Rules, Rule 83 (3a)—Order under—If can be issued on a firm ; *see* Defence of India Act 189

Forfeiture, claim of, by lessor against lessee upon the breach of the covenant—Lessor's right of action for injunction to restrain its breach ; *see* Lease 36

Fractional share-holder of property if can have the sale of the whole property set aside for material irregularity—Code of Civil Procedure, order 21 rule 90 ; *see* Sale 168

"Full Market Value"—Acquisition of servient tenement—Payment of compensation, made of ; *see* Land Acquisition 105

General Head Quarters (G. H. Q.)—"An authority higher than a Provincial Government" ; *see* Sanction 135

Government, acquisition of land by—Owner of dominant tenement how to be compensated ; *see* Land Acquisition 105

——— ——— ——— to pay the excess of valuation of easement or restrictive covenant over the deduction from the "full market value" of the servient tenement to the owner of the dominant tenement ; *see* Land Acquisition 105

Government of India Act, 1935 (Constitution Act), section 213—Advisory Jurisdiction—Federal Court not to insist on the inexpedieney of it ; *see* Reference 5

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Government of India Act, 1935; Schedule VII—Lists thereunder—Levy of Estate Duty as in English Law, if a matter under any of the above Lists; *see* Reference 5

Governor-General, if an authority higher than a Provincial Government; *see* Sanction 135

———————, if can refer any question on future legislation ("likely to arise") to Federal Court—Constitution Act, 1935, section 213; *see* Reference 5

———————— to take opinion of Federal Court before issuing notification under section 104 of the Constitution Act, 1935 for making addition to the lists under Schedule VII—Reference to be made before introduction of legislation; *see* Reference 5

———————, reference by, to Federal Court to be accompanied with draft notification to be issued under section 104 and a draft bill to be introduced; *see* Reference 5

Grant of legislative power carry with it certain accessory or incidental powers; *see* Reference 5

Garos of Mymensingh—Law of inheritance; *see* Inheritance 121

Habeas Corpus—*Section 491, Criminal Procedure Code (Act V of 1898)—Delivery of person liable to be tried by Court-martial, charged under section 41 of the Indian Army Act (VIII of 1911), when offence not stated under section 549(1), or when requisition not made under section 549(2) of the Criminal Procedure Code.*

An application for directions of the nature of a Habeas Corpus in respect of a person employed as a Siding Supervisor of a certain Air Field and delivered to the Military authorities by the trying Magistrate for trial by Court-martial, without requisition from the Commanding Officer of a Regiment as contemplated in section 549(2) of the Criminal Procedure Code or without a statement of the offence of which the person is accused, as required by section 549(1) of the Code, will prove infructuous, if before the final hearing of the same the Military authorities decide that the person will be tried by Civil Magistrate and release him from custody on bail, with that end in view. **Amarendra Chandra Chakravorty v. Garrison Engineer 926 Indian Works Section, Feni and others** 213

Handnote, case on, the stamp of which was not defaced, pending—An independant suit on original transaction, if lies; *see* Limitation ... 112

Heirs, natural, and dependant of a deceased subscriber have right subject to the preferential right of nominee to receive Provident Fund deposit; *see* Nominee, position of 152

High Court, reference to—Appellate Tribunal for income-tax matters allowing objection to place of assessment and including in reference, if alters legal position; *see Ultra vires* 265

Hindu nominee of an insurance policy taken after 1st April, 1923—A beneficiary; *see* Presumption 248

——— widow's estate—Estate of Hindu widow having absolute right of transfer—Difference between; *see* Hindu Law 90

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Hindu Law—*Bequest of absolute power of transfer without giving an absolute estate in the property to widow—Transfer by widow in exercise of such power, if binding on reversioners after her death.*

A Hindu without giving an absolute estate in the property to his widow can confer on her an absolute power of transfer. This fuller power of transfer thus given to the widow who would otherwise have had only a limited power of transfer does not clash with any fundamental principle of Hindu Law.

When such powers have been transferred, the widow can make transfer at her will without any legal necessity and such transfer would be binding on the reversioner on the widow's death.

Under the Hindu law, a widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for *(a)* religious or charitable purposes or *(b)* other purposes amounting to legal necessity or *(c)* for the benefit of the estate.

If a Hindu owner confers an absolute power of transfer on his next heir the widow, who would otherwise have had only a limited power of transfer, she acquires an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaining untransferred would devolve on the next heir of the husband, though where daughter or daughter's sons would be the next heirs they would be heirs of both. **Bishun Singh** *v.* **Sri Thakurji Mangala Nain Bhagwan** 90

——————Absolute power of transfer, by bequest, to Hindu widow, if can be made ; *see* Hindu Law 90

Husband acquiring property in the name of wife—The fact to be established to prove *benami* ; *see* Contract Act 59

Improvement Tribunal, President of, if can hear reference unders ection 18 of the Land Acquisition Act as an apportionment case without help of Assessors and without notice to the Collector under section 20 ; *see* Land Acquisition 105

Incidental encroachments of subjects in List I Schedule VII Constitution Act ; *see Ultra vires* 139

—————— or accessory powers are implied with grant of legislative power ; *see* Reference 5

Income arising out of British India, legislature authorising the inclusion of—Indian Income-tax Act, section 4-A(c)—If *ultra vires* of Indian Legislature ; *see Ultra vires* 265

Income-tax, Imposition and assessment of—Method of ; *see Ultra vires* ... 265

Indian Army Act, Section 41—Charged under—Delivery of person liable to be tried under Court Martial—Requisites under sections 549 (1) (2) of the Criminal Procedure Code not complied with ; *see Habeas corpus* ... 213

Indian Contract Act, Section 69—"Bound by law to pay" if includes personal liability as also liability on property of the "other" ; *see* Contract Act 59

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Indian Evidence Act—Admissibility—Cadastral survey record upto 1925, if admissible as regards the same status continuing after that year ; *see* Ejectment 173

Indian Income-tax Act—Amendment in 1939—Introducing test of residence—If gives jurisdiction to Indian Legislature ; *see Ultra vires* ... 265

————————, Section 4-A(c)—Second part—If extra-territorial in its operation - Even if extra-territorial, it is not *ultra vires* the Indian Legislature ; *see Ultra vires* 265

————————, Section 4-A(c)—Second part—Legislature authorising the inclusion of income arising out of British India—If *ultra vires* of Indian Legislature ; *see Ultra vires* 265

———————— (as amended in 1939), sections 4 (1) (b), 64(5)—Objection as to place of assessment—When and where to be taken ; *see Ultra vires* 265

Indian Limitation Act, Articles 11, 13, 120—Attachment before judgment rejected—Limitation for suit for establishment of right—Six years ; *see* Attachment before judgment 181

Indian Penal Code, Sections 408, 409—Offence under—Constitution Act, section 270—Protection ; *see* Sanction 275

Inheritance—*Custom—Garos of Mymensingh—Motherhood—Appointment by members of the clan—Plaintiff to show better title.*

The law of inheritance amongst the Garos of Mymensingh is that upon the death of a widow her property goes to her daughters, if any, and in their absence to another woman of the clan appointed by some of its members.

A acquired certain lands by his personal labour as well as with borrowed money. Upon his death, they passed to his widow, who died leaving sons, two sisters and a sister's daughter. A suit was brought by one of the sisters and sister's daughter, claiming the estate on the allegation that they are entitled to it in preference to the sons of the deceased under Garo custom :

Held, that the suit fails, as neither of the plaintiffs claim to have been appointed by some of the members of the clan, though it may be that according to Garo custom no man can inherit property under any circumstances whatever. The plaintiffs have to prove a better title than the sons of the deceased. **Nirodhini** *(alias)* **Nirodi Sangama** *v.* **Nanda Sangama** 121

————————, law of, amongst Garos of Mymensingh ; *see* Inheritance ... 121

Injunction to restrain a breach of restrictive covenant—Right of action—Lessor may claim forfeiture against lessee upon the breach of the covenant ; *see* Lease 36

Instalment decree and not a new preliminary mortgage decree followed by a new final mortgage decree for sale to be passed ; *see* Bengal Money Lenders Act 155

Interest of jotedar or raiyat if a "tenure"—"All interest in land"—Bengal Land Revenue Sales Act, 1868, section 1 ; *see* Ejectment 173

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Interest of lessee purchased by lessor—Lessor entitled to realise direct from the sub-lessee the rent payable under the sub-lease and not the rent payable by the lessee ; *see* Lease 36

————, raiyati—Bengal Land Revenue Sales Law, 1868, section 14 ; *see* Ejectment 173

Interpretation—"An authority higher than a Provincial Government" ; *see* Sanction 135

———————— of etmadar—Cadastral survey—Remark that entry of etmadar not binding on Government—Revisional survey—The interest is that of a tenure-holder ; *see* Ejectment 173

———————— of "subsequent order"—Code of Civil Procedure, section 48 (1) (b) ; *see* Compromise 100

———————— of the word "succession" in Entry 56 of List I ; *see* Reference 5

Introduction by broker of prospective buyer with seller resulting in contracts carries the commission usual in such cases ; *see* Contract 49

Invalid provisions of an Act, the question of severability of, from the valid provisions—Material only, if the Act held to be *ultra vires* the provincial legislature ; *see Ultra vires* 220

Irregularity—*Failure of Court to send the application for execution to the transferred Court.*

The failure of the Small Causes Court, which passed the decree, to send the decree to the Court to which the application for execution was transferred (the same officer happened to be presiding in both Courts), is a mere irregularity. **Hosainali Raj v. The Barisal Rindan Samity Limited, Barisal Town** 110

————————Failure of Small Causes Court to send the decree passed by it to the executing Court in time ; *see* Irregularity 110

Issue, point in, must relate to right of parties to suit—*Res judicata*—Code of Civil Procedure, section 11 ; *see* Contract Act 59

Jotedar or raiyat, interest of—If included in "tenure"—Bengal Land Revenue Sales Law, 1868, section 1 ; *see* Ejectment 173

Judge, trial, only knows the demeanour of the witness and can only form a reliable opinion regarding his creditability after cross-examination ; *see* Contract 49

Judgment-debtor commits default—Amount then due exceeds the purchase-price of the property—Mortgagee to get a personal decree for the balance ; *see* Bengal Money Lenders Act 155

———————————— restored to possession—Bengal Money Lenders Act, section 36(2)—Title with the decree-holder till last instalment of decretal sum paid off ; *see* Bengal Money Lenders Act 155

Jurisdiction, exercise of advisory, to be cautiously made—Prejudice to the rights of future litigants ; *see* Reference 5

———————— to Indian Legislature, if given by Amendment in 1939 of Indian Income-tax Act ; *see Ultra vires* 265

Khas possession, decree for, subject to liability for rent—If a constructive trust for rent ; *see Mesne profits* 229

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Land, definition of, if includes easement—Land Acquisition Act, section 3; *see* Land Acquisition 105

Land Acquisition—*Land Acquisition Act (I of 1894), section 18, reference under, on application of owner of dominant tenement heard by the President of the Improvement Tribunal without assessors—Such proceeding, if defective—Section 3, Land Acquisition Act—Easement, if comes within definition of "land"—Section 16—"Incumbrance," if includes easement—Right of dominant tenement, if to be valued independently—"Full market value" of servient tenement, how to be paid—Deduction from "full market value" of the servient tenement, if represents the value of the easement of the dominant tenement—Mode of disbursement of compensation to the dominant tenement.*

Without notice to the Collector and without the help of the Assessors, the President of the Improvement Tribunal heard the reference made under section 18 of the Land Acquisition Act on the application of the owner of the dominant tenement against the Collector's award of compensation to him, holding it to be one for apportionment only and not for valuation and increased the amount. On appeal:

Held, that the procedure followed was misconceived and defective. The Collector ought to have been given notice under section 20 of the Act and the case should have been tried as a valuation case, which under the provisions of the Calcutta Improvement Act, could be tried only by the Tribunal composed of the President and the two Assessors.

An easement comes within the definition of land as given in section 3 of the Land Acquisition Act, because it is benefit arising out of land.

On acquisition it would vest in the Government free from the easement of the owner of the dominant tenement (section 16). The owner of the dominant tenement would accordingly be entitled to compensation for the loss of his right. His right must be valued and he must be compensated by the sum of money which represents the value of the right.

On the compulsory acquisition of the servient tenement a sum of money should be deducted from its "full market value" and the balance only should be awarded to its owner.

The fallacy lies in the assumption that the value of an easement or restrictive covenant to the persons entitled thereto is the same as the amount by which the existence of that easement or covenant depreciates the value of the land subject thereto.

Where the value of the easement is more than the sum deducted from the "full market value" of the servient tenement, which is acquired in making payment to the owner thereof, the excess must be paid by the Government to the owner of the dominant tenement. **Bishun Prasad Chunder** *v.* **Binoy Krishna Rahatgi** 105

Land Acquisition Act, Section 3—Definition of land if includes easement; *see* Land Acquisition 105

——————, Section 18—Reference under—President of Improvement Tribunal if can hear it as an apportionment case without help of

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Land Acquisition Act—*(Contd.)*:

Assessors and without notice to the Collector under section 20 ; *see* Land Acquisition 105

———————, Section 20—Notice to Collector, it may be dispensed with by the President of Improvement Tribunal ; *see* Land Acquisition ... 105

Landlord, right of, to recover cash rent before the passing of the Assam (Temporarily Settled Districts) Tenancy Act, if taken away after it is passed ; *see* Rent, suit for 1

Law of inheritance amongst Garos of Mymensingh ; *see* Inheritance ... 121

Lease—*Sublessee, right of—Rent payable—Purchase in execution of rent decree of the leasehold land—Covenant in head lease*—Nirikh, *meaning of.*

The covenant in the head lease was expressed thus : "I will not be able to make permanent or periodic settlement of the land covered by the Kabuliyat with any one at a rate of rent *(nirkh)* less then the rate of rent at which it has been settled with me and excepting doing all acts in the said land in exercise of (mourasi) mokarari right, I will not be able to do any act prejudicial to your right. If I commit breach of this covenant, there will be cause of action for recovery of khas possession" :

Held, that the covenant was not at all to pay rent, but merely imposed a restriction as regards the terms on which the lessee might sub-let the land.

As a restrictive cevenant, the only right of action, if any, which the head lessor had, was to enforce it by injunction to restrain a breach. As against the lessee, the lessor might claim forfeiture upon breach of the covenant.

Obiter : There was no breach of covenant in this case. The word *'nirikh'* means rate of rent and had no reference to the total rent payable under the demise.

Held, that as purchaser of the lessee's interest at the rent execution sale, the lessor would be entitled to realise rent direct from the sub-lessee, but the rent would be the rent which the sub-lessee was liable to pay under his sub-lease, but not that payable by lessee to head lessor.

That the rent settled under the head lease was a consolidated rent and on that basis there was no breach of the covenant. **The Ganges Manufacturing Co. Ltd. v Srimati Radharani Dasi** 36

Leave to appeal—*Privy Council—Substantial question of law—Legislation, if* ultra vires—*Finding affecting a large number of people—Effect and implications of the Permanent Settlement—Provincial legislature, if can enact measures regulating the rights and liabilities of landholders and ryots—'Proprietor'—Litigant trying to persuade the members of the Court to reconsider the case by forwarding direct to Court further matter.*

Though the finding that section 178B of the Bihar Tenancy Act is not *ultra vires* the Bihar Legislature, is one affecting a large number of people, both zamindars and ryots in the Province of Bihar, the points of

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Leave to Appeal—*(Contd.)*:

law being not substantial, leave to appeal to Privy Council is refused. The whole argument in support of the appeal was based upon the effect and implications of the Permanent Settlement.

The Permanent Settlement had not deprived the Provincial Legislature of the power to enact measures calculated to regulate the rights and liabilities of landholders and ryots *inter se* in the Province.

The expression 'proprietor' has been used in the Permanent Settlement only as denoting the person who is directly liable to pay the revenue to Government.

The effect and implications of the Permanent Settlement were fully discussed by Privy Council.

The action of litigant to persuade the members of the Federal Court after hearing and before judgment to reconsider the case by forwarding direct to the Court further matter not brough to their notice by Counsel at the hearing, strongly condemned. **Hulas Narain Singh** *v.* **Deen Mohammad Mian & others** 217

Legal necessity, transfer by Hindu widow without, when empowered to do so, if binding on reversioners; *see* Hindu Law 90

Legislation, conflict between Provincial and Central—Constitution Act, section 107—Extension of the principle—Canadian doctrine of "occupied field"; *see Ultra vires* 220

———————, question relating to future, if can be referred to Federal Court by Governor-General—Constitution Act, 1935, section 213; *see* Reference 5

Legislative power, grant of, carry with it certain accessory or incidental powers; *see* Reference 5

Legislature, Federal, has no power to make a law providing for levy of Estate Duty as in English Law; *see* Reference 5

———————, inference as to intention of, to apply the provisions of a statute passed subsequently to suits the cause of action of which arose before it came into force; *see* Rent, suit for 1

Lessee—Lessor's right of action for injunction to restrain the breach of a restrictive covenant and of claim for forfeiture against lessee upon its breach; *see* Lease 36

———————, covenant by, not to make permanent or periodic settlement of land at a rate of rent less than that settled with him etc. the breach whereof would give rise to cause of action for recovery of khas possession, was a restrictive covenant only regarding sub-lease and not one to pay rent; *see* Lease 36

———————, interest of, purchased by lessor at rent execution sale—Lessor entitled to realise direct from the sub-lessee the rent payable under the sub-lease and not the rent payable by the lessee; *see* Lease 36

Lessor as purchaser of lessee's interest at rent execution sale entitled to realise direct from the sub-lessee the rent payable under the sub-lease and not the rent payable by the lessee; *see* Lease 36

Lessor's right of action for injunction to restrain breach of a restrictive

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Lessor's—*(Contd.)* :

covenant and of claim of forfeiture against lessee upon its breach ; *see* Lease. 36

Levy of Estate Duty as in English Law—Federal legislature, if has power to make law providing for the levy thereof ; *see* Reference... ... 5

——— of Estate Duty as in English Law, if a matter included in any of the Lists in Schedule VII to the Government of India Act, 1935 ; *see* Reference 5

——— of Estate Duty, if covered in List II of Schedule VII ; *see* Reference ... 5

Liability, personal and on property, of the "other" if included in the words "bound by law to pay"—Indian Contract Act, section 69 ; *see* Contract Act 59

Liabilities of debtors—Bengal Money Lenders Act ; *see Ultra vires* ... 133

Limitation—*Bengal Agricultural Debtors Act (VII B. C. of 1936), section 52—Suit on promissory note.*

The plaintiff alleges that he advanced Rs 149 to the mother of the defendants. She executed a promissory note in his favour. As the stamp was not defaced it could not be admitted in evidence. The plaintiff now seeks to recover on the original transaction ;

Held, that the limitation is saved under section 52 of the Bengal Agricultural Debtors Act, the debt being one. While the case on the handnote was pending, the plaintiff could not institute an independent suit on the original transaction. **Chandra Kumar Chowdhury** *v.* **Kala Meah** 112

——— Bengal Agricultural Debtors Act, section 52 ; *see* Limitation... 112

——— period reduced by subsequent statute—No retrospective effect —Suit within the previous period of limitation but beyond the reduced period, if barred ; *see* Rent, suit for 1

Limitation Act, section 14—Applicability of—Conversion of petition to application for execution ; *see* Appeal, if lies 118

Lists under Schedule VII Constitution Act, 1935—Notifications under section 104—Governor-General to take opinion of Federal Court before issuing notification—Reference to be made before introduction of legislation ; *see* Reference 5

Material irregularity—Code of Civil Procedure, Order 21 rule 69—Date and hour of sale not specified by Court ; *see* Sale 168

——— Order of Court that sale to be held after Misc. Case disposed of ; *see* Sale 168

Mesne profits—Decree-holder purchaser not accountable to judgment-debtor from the date of taking possession—Judgment-debtor when and from what point of time entitled to get mesne profits ; *see* Bengal Money Lenders Act 155

——— *Equitable set off—Constructive trust—Resumed Chaukidari chakran land—Zemindar and patnidar—Ascertainment of fair and equitable rent—Principle applicable—Remand order—No appeal preferred.*

Suits were instituted by the predecessors-in-interest of the appellants as

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Mesne profits—*(Contd.)*:

patnidars to the extent of eight annas share and darpatnidars to the extent of the remaining eight annas share against the defendant No. 1 (zemindar) and his tenants for the recovery of khas possession of certain resumed chaukidari chakran lands and for mesne profits. The suits ended in favour of the plaintiffs and decrees were made on 23rd September, 1910 to the effect that the plaintiffs would get khas possession on condition of paying additional rent and would have mesne profits till the date of delivery of possession. These decrees were confirmed by the District Judge on appeal who remanded the cases for determining the terms and conditions under which the suit lands were to be held by the plaintiffs and for the ascertainment of mesne profits. The decrees were—"plaintiffs' title was declared to the suit lands and they were to get khas possession of the same by ejecting the tenant de endants on condition of paying the defendant No. 1 (the zemindar) an additional rent to be determined on the principle that the original putni rent should bear the same ratio to the patni rent now payable by the plaintiffs as the original Hustabud at the time of the creation of the patni should bear to the present increased Hustabud or any other fair and equitable rent which may be determined at the time of assessing the mesne profits. These decrees were reversed by the High Court but affirmed by Privy Council on the 7th July, 1925.

The plaintiffs got delivery of pos ession on 23rd November, 1910.

On the 8th December, 1922, the plaintiffs filed applications for the ascertainment of mes e profits and on 28th May, 1927, the defendant No 1 (zemindar) filed objec ions claiming set-off for rent due. On 18th December, 1937, the Munsiff delivered judgment awarding the plaintiffs a total sum of.....as mesne profits for the period from 22nd December, 1906 to 23rd November, 1910, after giving a set-off for certain items out of the claims put forward by defendant No. 1.

On appeal, the learned District Judge on 16th December, 1938, modified the decision of the Munsiff by allowing equitable set-off (a) for rents due to defendant No. 1 and revenue and cesses paid, subsequent to the date of delivery of possession to the plaintiffs (that is from 23rd November, 1910 till 28th May, 1927); (b) for full rents due prior to the period of Wasilat in connection with the realisation of arrears relating to two mouzahs (i. e. from 1903 to 1909) and for revenue and cesses paid; (c) by not giving credit for the arrears not realised from tenants during the Wasilat period; (d) by allowing rent to defendant No. 1 on the basis of certain declsion and not on the annual assets of the land determined by the Collector and by reducing the rate of interest during the period of Wasilat from 12 per cent. to 6 per cent. per annum:

Held, that the equitable set off could not be claimed by the zemindar (defendant No. 1). The decrees in the original suits did not create the claims, they were merely declaratory decrees. The fixing of rent was not a condition precedent to the patnidars being put in possession and the zemindar (defendant No. 1) was not entitled to an equitable set-off

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Mesne profits—*(Contd.)* :

for the rents, revenue and cess for the period subsequent to the date of delivery of possession to the plaintiffs as also for rent, revenue and cesses prior to the period of Wasilat.

No constructive trust for the rent that was to fall due to the zemindar (defendant No. 1) could come into existence by the decree which merely provided for khas possession subject to the liability for rent. No cause of action for rent could have arisen at the time of the filing of the plaint or the written statement in these suits, and hence the two claims were quite different and uncertain in nature, subject-matter and circumstances.

That the amount of rent payable by the patnidar should not be made to depend solely upon the circumstances of the point of time chosen by the zemindar or by the patnidar to bring their respective suits for ascertainment of rent or for khas possession. No evidence was adduced to show what was the gross collection at the time of the creation of the original patni in 1852. Hence the fair rent was to be assessed on the basis of annual value of the land determined by the Collector at the time of resumption in 1899.

That the claim for set-off on the ground of Munafa during the Wasilat period, viz, 1901 1913 was disallowed on the ground that the claim was put forward by the zemindar (defendant No. 1) long after the decree was made, the plaintiffs not being in possession during that period, that the plaintiffs' liability was a joint liability with the other co-sharer patnidars, who were not made parties in the Court of appeal below and that the nature and subject-matter of the claim were entirely different and were such as could not have been entertained in a Court of equity.

Where the whole suit was not disposed of upon any preliminary point, the trial Court decided the several issues on their merits except for one issue in respect of which the lower appellate Court remanded the case :

Held, that neither in form nor in substance the order could be treated as one made under order 41 rule 23 of the Code of Civil Procedure or purporting to be made under it, though irregularly made ; that such order being made under the inherent power of Court, could be attacked in appeal from decree. **Maharaj Bahadur Singh v Raja Bhupendra Narayan Singh Bahadur & others** 229

——————Equitable set off—Fixing of rent, if a condition precedent to the patnidars being put in possession ; *see Mesne profits* 229

Military Code, Army Act, military offences, or Court Martial proceedings, if has any bearing on the words "proceedings civil or criminal" in section 270(1) of Constitution Act ; *see* Court Martial 81

——— offences, Military Code, Army Act or Court Martial proceedings, if has any bearing on the words "proceedings civil or criminal" in section 270(1) of Constitution Act ; *see* Court Martial 81

Misjoinder of charges ; *see* Defence of India Act 189

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Misjoinder, proceedings, if void for—Criminal Procedure Code, section 236; *see* Defence of India Act 189

Mortgage, all properties under, not sold—A preliminary decree of sale followed by a new final decree of sale of the remaining properties to be passed; *see* Bengal Money Lenders Act 155

————, security bond, if enforceable as; *see* Appeal, if lies 118

———— decree, a new preliminary, followed by a new final mortgage decree for sale, if to be passed or an instalment decree for the amount to be passed; *see* Bengal Money Lenders Act 155

———— deed of 1921—Recital of status as etmadar—If good evidence regarding the same status for subsequent period; *see* Ejectment ... 173

———— sale, purchaser in—Position of; *see* Ejectment 114

Mortgagee to get a personal decree for the balance of the amount defaulted over the purchase-price of the property of the judgment-debtor; *see* Bengal Money Lenders Act 155

Necessary parties—Non-contesting defendants—Suit for contribution—Appeal by contesting defendant without making non-contesting defendants parties; *see* Contribution, suit for 45

Negotiable Instruments Act, if affected by Bengal Money Lenders Act, section 30, 36 and 38; *see Ultra vires* 139

Nominee, Hindu in a life insurance policy issued after 1st April, 1923—Act III of 1923—A beneficiary; *see* Presumption 248

———— of a deceased subscriber has preferential right over the natural heirs and defendants to receive the Provident fund deposit; *see* Nominee, position of 152

————, *position of—Provident Funds Act (XIX of 1925), section 5—Right of nominee to receive the money on death of subscriber—Nominee, if has preferential right over natural heirs—Question of title, if relevant in a proceeding for succession certificate.*

A nominee of a subscriber of the Provident Fund has preferential right to receive the Provident Fund deposit over the natural heirs on the death of the subscriber, in the absence of any rules of the Fund framed under section 3 (2) of the Provident Funds Act that the amount is payable to the dependent of the subscriber.

In a proceeding for succession certificate any question of title is irrelevant.

Ekbal Ahmed *v.* **Dr. Md. Maqsood** 152

Notice to Collector under section 20 of the Land Acquisition Act, if can be dispensed with by the President of Improvement Tribunal while hearing a reference under section 18 as an apportionment case; *see* Land Acquisition 105

Notification, before issue of, under section 104 of the Constitution Act, 1935 adding to the Lists in Schedule VII—Governor-General to take opinion of Federal Court before issuing notification—Reference to be made before introduction of legislation; *see* Reference 5

Objection as to place of assessment—Not contemplated by Indian Income-tax in appeal against assessment; *see Mesne profits* 265

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Objection to reference to Federal Court on the ground that it refers to future legislation, if can be entertained—Constitution Act, 1935, section 213, "likely to arise" ; *see* Reference 5

Onus of proof—Sale certificate in the name of—The person alleging benami to rebut the presumption ; *see* Presumption 248

Order by execution of which the property of judgment-debtor attached before judgment was released, if amounts to a decree and if appealable ; *see* Appeal, if lies 118

——— of Court that sale to be held after Misc. case disposed of—If material irregularity ; *see* Sale 168

——— made under inherent power of Court, if can be attacked in appeal from decree ; *see* Mesne profits 229

Owner of dominant tenement, right of, must be valued and he must be compensated with that sum on acquisition by Government ; *see* Land Acquisition 105

Parliament enacting Constitution Act—Section 213—Advisory Jurisdiction —Federal Court not to insist on the inexpediency of it ; *see* Reference... 5

Partner, sleeping, if can be said to be carrying on business there within the meaning of section 64(5) of the Indian Income tax Act ; *see ultra vires* 265

Partnership Deed—Sleeping partners—If can be said to be carrying on business there within the meaning of section 64(5) of the Indian Income tax Act ; *see ultra vires* 265

Permanent or periodic settlement of land by the lessee at a rate of rent less than that settled with him etc. the breach whereof would give rise to cause of action for recovery of khas possession contained in a covenant of the lease was a restrictive covenant only regarding sublease and not one to pay rent ; *see* Lease 36

Permanent Settlement, effect and implications of ; *see* Leave to appeal ... 217

———————, if deprived Provincial Legislature of enacting the rights etc. of landlords and ryots inter ; *see* Leave to appeal ... 217

"Person in authority" interpretation of—Complainant inducing accused to make statement—Evidence Act, section 24 ; *see* Evidence ... 149

Personal decree—Mortgagee to get—Failure of judgment-debtor to pay instalment due ; *see* Bengal Money Lenders Act 155

Possession of property restored to judgment-debtor—Bengal Money Lenders Act section 36(2)—Title to the property remains with Decree-holder till the decretal dues are paid off ; *see* Bengal Money Lender's Act ... 155

——— ——— of title-deeds of property or issue of rent-receipts by wife would not afford any certain criterion for determination of benami ; *see* Contract Act 59

Power of the Governor-General to refer any question on future legislation ("likely to arise") to Federal Court—Constitution Act, 1935, section 213 ; *see* Reference 5

Powers, certain accessory or incidental, are implied with grant of legislative power ; *see* Reference 5

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Pre-act right of landlord to recover cash rent, if taken away by The Assam (Temporarily Settled Districts) Tenancy Act ; *see* Rent, suit for... 1

Prejudice to the rights of future litigants—Result of exercise of advisory jurisdiction even under the provisions of law ; *see* Reference ... 5

Preliminary point, whole suit not disposed of upon—Court decided several issues on merits except one for which the lower appellate Court remanded the case—Order made under inherent power of Court, if can be attacked in appeal from decree ; *see* Mesne profits 229

President of Improvement Tribunal, if can hear reference under section 18 of Land Acquisition Act as an apportionment case without help of Assessors and without notice to the Collector under section 20 ; *see* Land Acquisition 105

Presumption—Apparent state of things to be presumed to be real—The person alleging *benami* must adduce evidence to rebut the presumption ; *see* Contract Act 59

———*Partition—Benami—Burden of proof—Sale certificate—Civil Procedure Code (Act V of 1908), section 66—Life policy—Nominee—Policy money, who is entitled to.*

Where the sale certificate stands in the name of A, the Court is bound to presume that he is the real owner of the property and the burden lies upon the person alleging the purchase to be *benami* to rebut the presumption and show that the apparent state of affairs is not the real state.

Section 66 of the Code of Civil Procedure is confined to suits for possession.

Quære : Whether section 66 of the Code of Civil Procedure is applicable to partition suit.

A person, a Hindu, who was made a nominee in life assurance policy by the assured after 1st April, 1923, ranks as a beneficiary and is entitled to the policy money. **Jitendra Nath Sur** *v.* **Amarendra Nath Sur** 2

——— ———Sale certificate in the name of A—A is presumed by Court to be the real owner—The person alleging *benami* to rebut the presumption ; *see* Presumption 248

Privy Council, leave to appeal to—Substantial question of law, what is ; *see* Leave to appeal 217

Probability, estimate of, if can be justified by ultimate issue of events ; *see* Contract 49

Procedure, correct, to be followed by the President of Improvement Tribunal while hearing a reference under section 18 of the Land Acquisition Act ; *see* Land Acquisition 105

———, to be followed by plaintiff decree-holder—Application in the suit for sale of certain property mortgaged by surety in the security bond—Civil Procedure Code, section 145 ; *see* Appeal, if lies ... 118

Proceedings, Court Martial, are not criminal proceedings within the meaning of section 270(1) of the Constitution Act ; *see* Court Martial ... 81

———, criminal, Court martial proceedings, if—Constitution Act 1935, section 270(1) ; *see* Court Martial 81

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Proceedings, for succession certificate—Question of title if relevant; *see* Nominee, position of 152

——————, if void for misjoinder—Criminal Procedure Code, section 236; *see* Defence of India Act 189

——————, instituted before sanction, if wholy void—New proceedings, if required to be started afresh after sanction; *see* Sanction 275

"——————— civil or criminal" in section 270(1) of Constitution Act 1935 have no reference to Army Act, the Military Code, military offences or proceedings by Court Martial; *see* Court-Martial 81

Prohibition imposed on Provincial Legislature—Constitution Act, section 100(1); *see Ultra vires* 139

Promissory note—One of a class of documents on which moneys lent—Regulation and control of money-lending (*e. g.* Bengal Money Lenders Act) if taken out of the control of provincial legislature; *see Ultra vires* 220

——————————, claims under—Bengal Money Lenders Act, sections 30, 36, 38; *see Ultra vires* 139

——————————, legislation on, if *ultra vires* the provincial legislature—"Money lending and money-lenders"—Entry No. 27, List II of Schedule VII of the Constitution Act; *see Ultra vires* 220

——————————, rights and liabilities under—Bengal Money Lenders Act even if affects these is not wholly *ultra vires*; *see Ultra vires* ... 220

Proof of *benami* depends on the person paying the price and the conduct of the parties; *see* Contract Act 59

Property in goods, if passes by handing over of the delivery order—Intention of parties—Subsequent acceptance of money by vendor is another act of disposal; *see* Defence of India Act 189

"Proprietor", connotation of—Permanent Settlement; *see* Leave to appeal... 217

Prosecutor, if a "person in authority"—Evidence Act, section 24; *see* Evidence 149

——————, statement made to, by a person not examined as a witness, if admissible in evidence—Evidence Act, sections 32, 33; *see* Evidence ... 149

Provident Fund deposit—Preferential right of nominee over the natural heirs and dependants; *see* Nominee, position of 152

Provident Funds Act, section 5—Nominee; *see* Nominee, position of ... 152

Provincial Legislature, prohibition imposed on—Constitution Act, section 100 (1); *see Ultra vires* 139

——————————, *ultra vires* of, Bengal Money Lenders Act if partly; *see Ultra vires* 133

Provisions of statute touching a right in existence at the passing of the statute, if to be applied retrospectively in the absence of express enactment or necessary intentment; *see* Rent, suit for 1

Punishment of accused under the rule in force at the time the contravention took place; *see* Defence of India Act 189

Purchaser in mortgage sale—Position of; *see* Ejectment 114

Putni Regulation—Regulation VIII of 1819, sections 8, 9, 17(3)—Provision, if any, when sale proceeds less than arrears; *see* Putni sale 176

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Putni sale—*Arrears of putni rent—Sale of tenure under Putni Regulation (Regulation VIII of 1819)—Price fetched, insufficient to cover entire demand—Balance, if may be recovered by suit—Sections 8, 9 and Proviso to section 17(3) of the Regulation—Contract providing for such recovery, if runs with the land and if consistent with the Regulations—Bar of execution under section 168A, Bengal Tenancy Act, (VIII of 1885), if good ground for refusing to pass decree.*

There is no provision in the Putni Regulation itself expressly dealing with the situation which arises when the sale proceeds fall short of the demand.

Section 17(3) of the Putni Regulation has got no application to such cases and as no fresh sale of the tenure can be held for realisation of the balance, the only remedy of the zemindar must be to enforce his contractual rights against the tenant.

The words "in liquidation" in section 8 of the Putni Regulation do not mean that if the price fetched does not cover the entire demand, the zemindar must forego the balance.

The words "in satisfaction of whose demand the sale may be held" in section 9 of Putni Regulation do not imply that the demand must be deemed in law to have been wiped out and satisfied by the sale irrespective of the price that the sale fetched.

A stipulation in the putni engagement to the effect that "in case the sale does not yield a sufficient amount to make good the balance of rent, the remaining properties of the defaulter should be further answerable for the demand" is, far from being inconsistent with the spirit of the Regulation, quite in conformity with it.

Whether section 168A of the Bengal Tenancy Act is a bar to the execution of a decree is a question to be decided if and when the decree is put into execution and cannot be a ground for refusing to pass a decree. **Usha Prova De** *v.* **Sachindra Kumar Basu** 176

Question *vis.* "The situs of moveable property shall be such as may be specified in the law or prescribed by rules made under the law" does not turn on the construction of the list in Schedule VII but on section 99 of the Constitution Act, 1935; *see* Reference 5

Raiyat or jotedar, interest of—If included in "tenure"—Bengal Land Revenue Sales Law, 1868, section 1; *see* Ejectment 173

Raiyati interest—Bengal Land Revenue Sales Law, 1868, section 14; *see* Ejectment 173

Rebutting presumption—The person alleging *benami* must adduce evidence to rebut the presumption; *see* Contract Act 59

Recital in mortgage deed of 1921—Status as etmadar—If good evidence regarding the same status for subsequent period; *see* Ejectment ... 173

Recovery of cash rent, right of landlord for, before the passing of The Assam (Temporarily Settled Districts) Tenancy Act, if taken away after it is passed; *see* Rent, suit for 1

——— of khas possession, cause of action for—Breach of covenant that lessee not to make permanent or periodic settlement of land at a rate of

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rent less than that settled with him—Covenant a restrictive one only regarding sub-lease and not one to pay rent ; *see* Lease 36

Reference—*Federal power, if can legislate for the levy of Estate Duty—Advisory jurisdiction—Constitution Act, 1935, section 213—Question relating to future legislation—Charging section, scope of—Notification under section 104 of the Constitution Act—"Shall be deemed to include".*

As the Federal Court is not confined strictly to question of interpretation of the terms used in the Reference and as invited to give its opinion on the assumption that the tax referred to in the Reference as proposed to be levied is one resting on the same essential bases and having the same essential incidents as Estate Duty in the English Law, on that assumption the Court delivered the following

Opinion.

The Federal Legislature has no power to make a law providing for the levy of Estate Duty of the nature and with the incidents of Estate Duty under the English Law.

The levy of Estate Duty of the kind above-referred to is not a matter included in any of the Lists in Schedule VII to the Government of India Act, 1935.

Per Zafrulla Khan, J. : In the state of the material made available to Federal Court it is impossible to express any opinion on the questions referred by His Excellency the Governor-General under section 213 of the Government of India Act, 1935.

Per C. J. and Varadachariar, J. : When Parliament has thought fit to enact section 213 of the Constitution Act, it is not for the Federal Court to insist on the inexpediency of the advisory jurisdiction ; nor does it assist to say that the opinions expressed by the Court on the questions referred will have no more effect than the opinions of the law officers.

Per Zafrulla Khan, J. : The exercise of advisory jurisdiction, even in pursuance of provision made in that behalf in statute, may often be attended with great inconvenience, occasion embarrassment and result in prejudice to the rights of future litigants. It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution.

Per C. J. and Varadachariar, J. : The fact that the questions referred to Federal Court relate to future legislation cannot by itself be regarded as a valid objection, as section 213 of the Constitution Act empowers the Governor-General to make a reference when questions of law are "likely to arise".

As the issue of a notification under section 104 of the Constitution Act thereby adding to the Lists in Schedule VII is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists. In this class of cases, the Reference should, in the very nature of things,

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Reference—*(Contd.)* :

be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force.

In dealing with such questions as are referred to Federal Court, the Court has to make certain assumptions and reservations in answering them. The necessity for making such reservations may arise in particular cases and the proper course for the Court to adopt in such cases is to make its report with such reservations as may be found necessary.

Per Zafrulla Khan, J. : The Court must be furnished with the fullest material on the subject in an exact and precise form and should not be left to base its opinion upon assumptions or be reduced to the necessity of safeguarding against misapprehension or misconstruction of what it might have to say by a profuse employment of 'ifs' and 'buts' and 'provideds'. In other words, it should be put in a position to arrive at a determination of the questions referred with confidence that its opinion would furnish some guidance and help. One precaution that might be taken would be to attach to the Reference a draft of the bill which it is proposed to place before the legislature. A draft might be found to be of considerable assistance.

Per C. J. and Varadachariar, J. : It would make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under section 104 and a draft bill to be introduced to carry out the proposals.

Per Zafrulla Khan, J.: A law enacting that upon the death of a person there should be levied a duty in respect of property of the deceased may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term 'succession' in that entry.

Whenever the Federal Court is invited to tender an opinion upon questions of law, the questions must be cast in a precise and exact form and the reference itself must contain all the materials necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material comprised in the reference. In determining the true nature of a tax considerable help may be derived from the machinery provisions and the schedules :

Per C. J. and Varadachariar, J. : A perusal even of the machinery section may often be useful and sometimes even necessary to elucidate the scope of the charging section.

Per Zafrulla Khan J. : The Court cannot be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information of the subject of machinery etc. which would be necessary to make the duty effective.

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Reference—*(Contd.)*:

In the case of some of the items it would not have been possible to arrive at any conclusion one way or the other in the absence of a draft of the legislative provisions embodying the items.

As regards the point ("The situs of moveable property shall be such as may be specified in the law or prescribed by rules made under the law", it does not turn on the construction of the List in Schedule VII but on section 99 of the Constitution Act. As the validity of such legislation depends upon its conforming to the provisions of section 99 of the said Act, the question does not therefore admit of a general answer. There is nothing in List II of Schedule VII to cover the proposed duty.

Per C. J. and Varadachariar, J. Recognising that there are real and substantial difference between succession and Estate Duties, the word 'succession' used in Entry 56 of List I which speaks of "duties in respect of succession to property" is used in a narrow sense and means transmission by law or by will of men, to one or more persons of the property and the transmissible rights and obligations of a deceased person.

It is not appropriate to describe a levy in the nature of Estate Duty.

With reference to the form of question (1) it is inadequate. It may generally be true to say that questions (1) and (2) correspond to charging sections of the proposed Act; but a perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section.

Assuming that in the absence of material, an affirmative answer could have been returned to the first question as it stands, it would have been extremely difficult to return an answer to the whole of question (2) (a) in the absence of such material.

While it is true that the grant of legislative power in respect of a certain subject-matter will carry with it certain accessory or incidental powers, including a power to enact provisions to make effective the exercise of the main power or prevent evasion of the law enacted under that power, provisions of this kind are substantially different from provisions calculated to extend the scope of the main power itself by a statutory fiction. It is bound to be a question of much difficulty—and one which could only usefully be attempted when the legislation has taken much more final form—to determine whether the various provisions set out in question (2) (a) can be regarded as 'incidental' or 'accessory' or 'necessary'.

Re Reference under section 213 of the Government of India Act 5

——— by Governor-General to Federal Court to be accompanied with draft notification to be issued under section 104 and a draft bill to be introduced; *see* Reference 5

——— to arbitration—Schedule II of Code of Civil Procedure in force—Decree by primary Court in accordance with award—Decree set aside on appeal—Second appeal, if lies; *see* Second Appeal 1 2

——— to Federal Court on questions relating to future legislation, if

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Reference—*(Contd.)*:

can be made by Governor-General—Constitution Act, 1935 section 213; *see* Reference 5

——— to Federal Court should be complete in itself and should not be left to be supplemented by the counsel by oral submissions; *see* Reference 5

——— to Federal Court should be made by Governor-General before introducing legislation as to whether it covers any of the entries in the lists under Schedule VII of the Constitution Act; *see* Reference ... 5

——— to High Court—Appellate Tribunal for income-tax matters allowing objection to the place of asses ment and including it in reference if alters legal position; *see Ultra vires* 265

——— under section 18 of Land Acquisition Act—President of Improvement Tribunal if can hear it as an apportionment case without help of Assessors and without notice to the Collector under section 20; *see* Land Acquisition 105

Regulation VIII of 1819, section 8—"In liquidation"—Interpretation of—Zemindar if to forego balance of dues over sale proceeds; *see* Putni Sale... 176

———————, sections 8, 9, 17 (3)—Arrears of putni rent—Provision, if any, when sale proceeds less than arrears; *see* Putni Sale ... 176

Release of one debtor by creditor does not bar claim of contribution by another debtor against the released debtor; *see* Contract Act ... 59

Relevency of question of title in Succession Certificate proceedings; *see* Nominee, position of 152

Relief—Appeal by contesting defendant in a suit for contribution without making other defendants parties in appeal—No relief can be given; *see* Contribution, suit for 45

Rent, amount of, payable by the putnidar—Not determinable from evidence on record—Fair rent to be assessed by the Collector on the basis of annual value at the time of resumption in 1899; *see* Mesne profits ... 229

——, amount of, payable by the putnidar—Not to be made to depend solely upon the circumstances at the point of time chosen by Zemindar or putnidar; *see* Mesne profits 229

—— execution sale—Lessor purchases lessee's right—Lessor entitled to realise direct from the sublessee the rent payable under the sublease and not the rent payable by the lessee; *see* Lease 36

——, fair, to be assessed by Collector for putni on the basis of annual value at the time of resumption in 1899; *see* Mesne profits 229

—— payable to lessor by the sublessee when the lessor purchases the lessee's interest—Lessor entitled to realise direct from the sublessee the rent payable under the sublease and not the rent payable by the lessee; *see* Lease 36

——, rate of, settled with the lessee—Covenant in the lease that the lessee not entitled to sublet at a rate of rent less than what is settled with him—Breach will entail cause of action for recovery of Khas possession—A restrictive covenant only regarding sublease and not one to pay rent; *see* Lease 36

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Rent settled under the head lease at a lump sum with the covenant that the lessee shall not be entitled to make permanent or periodic settlement at a rate of rent less than that settled with him, was a consolidated rent and the grant of a sublease at a rate of rent less than that granted to him was no breach of covenant ; *see* Lease 36

——, *suit for—The Assam (Temporarily Settled Districts) Tenancy Act, 1935, sections 1(2), 3(17), 44—Retrospective effect of statute—Pre-Act right of landlord to recover cash rent—Limitation—Empowering Executive Government to fix by notification the date on which the Act is to come into operation—Right of suit.*

The Assam (Temporarily Settled Districts) Tenancy Act, 1935, does not take away the pre-Act right of the landlord to recover cash rent at the contractual rate.

Provisions of Statute which touch a right in existence at the passing of the Statute should not be applied retrospectively in the absence of express enactment or necessary intentment.

A right of suit is a vested right.

The defendants took settlement of 16 bighas odd land in the District of Cachar (temporarily settled district in the Province of Assam) from the plaintiffs by executing a registered Kabuliat on the 10th Bhadra, 1342 corresponding to 27th August, 1934, for 15 years at an annual rent of Rs. 70. The Assam (Temporarily Settled Districts) Tenancy Act, 1935 was passed in 1935 but came into force on the 1st March, 1937.

On 26th July, 1939, the plaintiffs instituted the present suit for recovery of arrears of rent from 1341 to 1345 B. S. at the stipulated rate of Rs. 70 per year. The defence of the tenant was that they were not liable to pay more than Rs. 7-8 annas per year, that is, five times the annual revenue of the disputed land in view of the provisions of section 44 read with section 3(17) of the Assam (Temporarily Settled Districts) Tenancy Act, 1935 :

Held, that the plaintiffs were entitled to recover rent at the contractual rate, that is Rs. 70 per year for the entire period in suit and not for the period 1341 to 1342 B. S.

Before the Assam Tenancy Act came into force the period of limitation for recovery of arrears of rent was 6 years. The Assam Tenancy Act reduced this period to 3 years :

Held, that the plaintiffs' claim for recovery of arrears of rent for 1341 and 1342 was not barred by limitation, as the vested right was not taken away by the Assam Tenancy Act, 1935.

From the provision of a Statute which empowers the Executive Government to fix by notification the date on which the Act is to come into operation, it cannot be inferred that the Legislature intended the Act to apply to suits the cause of action of which arose before the Act came into force. **Brojendra Lal Roy v. Mubeswar Ali Choudhury** ... 1

Rent-receipts, issue of, or possession of title deeds by wife would afford no certain criterion for determination of benami ; *see* Contract Act ... 59

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Res judicata—Code of Civil Procedure, section 11—Point in issue must relate to right of parties to suit—Determination of those rights may depend on facts and law; *see* Contract Act 59

Restraint of a breach of restrictive covenant—Injunction—Right of action—Lessor may claim forfeiture against lessee upon the breach of the covenant; *see* Lease 36

Restrictive covenant, valuation of, how to be made; *see* Land-Acquisition 105

Results, solely on, the decision of Federal Court on construction cannot rest; *see* Court Martial 81

Retrospective effect on a pre-existing right by the provisions of a Statute subsequently passed without express enactment or necessary intentment, if should be allowed; *see* Rent, suit for 1

Reversioners, if bound by the transfer by Hindu widow having absolute power of transfer by bequest; *see* Hindu Law 90

Review—*Judgment of Federal Court.*

The Federal Court cannot entertain an application for review of its own judgment except in certain circumstances. The maxim *Interest reipublicae ut sit finis litium* is to be taken into account in every case. The power to review is one to be exercised with extreme caution and only in very exceptional cases. In such cases, when by misprision in embodying the judgment, errros have been introduced, a rehearing at the instance of one of the parties is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. The judgment cannot be reopened only for the reason that new evidence is forthcoming. **Hulas Narain Singh** *v.* **Deen Mohammad Mian** 216

Revision—Civil Procedure Code, section 115—Incompetent reference to arbitration and decree in accordance with award set aside on appeal—No second appeal; *see* Second appeal 123

Revisional Survey—After cadastral survey—Etmadar, if a tenure holder; *see* Ejectment 173

Right in existence touched by a Statute passed subsequently if can be affected retrospectively in the absence of express enactment or necessary intentment; *see* Rent, suit for 1

——— of suit is a vested right; *see* Rent, suit for 1

——— of suit within the pre-existing period of limitation, if barred under the subsequent Statute reducing the said period; *see* Rent, suit for ... 1

——— of owner of dominant tenement must be valued and he must be compensated with that sum on acquisition by Government; *see* Land Acquisition 105

———, preferential, of nominee over natural heirs and dependants of a deceased subscriber to receive Provident Fund deposit; *see* Nominee, position of 152

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Right of action on a restrictive covenant was for injunction to restrain its breach and the lessor may claim forfeiture against lessee upon the breach of the covenant ; *see* Lease 36

Rule in force at the time the contravention took place—Punishment of accused ; *see* Defence of India Act 189

—— of severability not to be invoked to uphold the validity of impugned Act—Conflict between provincial and central enactment—Both intra vires of respective legislature—Doctrine of repugnancy and not of *ultra vires* applicable ; *see Ultra vires* 220

Sale—*Sale in execution of decree—Adjournment without specification of hour—Such sale, if and when may be set aside in part—Civil Procedure Code (Act V of 1908), order 21, rule 90.*

It is incumbent upon the Court to specify both the day and hour under order 21, rule 69 Civil Procedure Code. Failure to specify the same is a material irregularity.

It is a material irregularity to pass an order that the sale will be held after a Miscellaneous case started by the judgment-debtor is disposed of.

Order 21, rule 90 speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularity or fraud. A sale which is affected by such defects cannot be set aside in part, and it is immaterial that the person who applies to set it aside, is interested only in a fractional share of the property sold.

Where properties are sold in execution of decree separately in separate lots, the sale of each lot is a separate sale and the sale may be upheld with regard to some of the lots and set aside as regards the rest under the provisions of Order 21, rule 90 of the Code of Civil Procedure. **Shila Pal v. The Comilla Banking Corporation, Limited** 168

——, auction, on the last date fixed by agreement of parties on dismissal of appeal against order of executing Court, if illegal or irregular ; *see* Execution 129

——, date and hour of, not specified by Court—Code of Civil Procedure, order 21, rule 69—If a material irregularity ; *see* Sale 168

—— of property in execution of decree—Separately in separate lots—Sale of each lot a separate sale—Sale may be set aside regarding some lots and upheld regarding others ; *see* Sale 168

—— of the whole property, if can be set aside in part by fractional share-holder—Code of Civil Procedure, order 21, rule 90 ; *see* Sale ... 168

Sanction—*Constitution Act, section 270—Section 408 or section 409, Indian Penal Code (Act XLV of 1860)—Proceedings, if valid without consent.*

Offence under section 408 (Criminal Breach of Trust by a Clerk or Servant) or section 409 (Criminal Breach of Trust by a Public Servant or by Banker, Merchant or Agent), Indian Penal Code, is not one in respect of which the protection of section 270 of the Government of India Act, 1935 can be claimed.

Section 270 of the said Act, which requires that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is

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Sanction—*(Contd.)*:

obtained, is to be strictly observed. **Suraj Parkash** *v.* **The King-Emperor** 275

———*Criminal Procedure Code (Act V of 1898), section 197—"An authority higher than a Provincial Government"—G. H. Q.*

The expression "an authority higher than a Provincial Government" in section 197 of the Code of Criminal Procedure has reference to the Central Government, the Governor-General and the Secretary of State; G. H. Q. is thus not an higher authority. **M. L. Bannerjee** *v.* **The King-Emperor** 135

———Constitution Act, section 270; *see* Sanction 275

Scope of the charging section—Elucidation of—Perusal of machinery section may often be useful and sometimes even necessary; *see* Reference ... 5

Second appeal—*If lies—Order setting aside the order of primary Court that the Court was without jurisdiction in making a reference to arbitration—Procedure.*

There was a reference to arbitration while Schedule II of the Code of Civil Procedure was still in force. The primary Court made a decree in accordance with the award. On appeal by the plaintiff, the lower appellate Court set aside the order on the ground that the reference to arbitration was without jurisdiction:

Held, that no second appeal lay. The remedy of the party was to apply to the High Court under section 115 of the Code of Civil Procedure to set aside an order of the lower appellate Court as being without jurisdiction.

That no appeal lay to the lower appellate Court.

That it was not enough for the petitioner in revision to show merely that the order of the lower appellate Court was made without jurisdiction. He must further show that the appellant in the lower appellate Court would have failed, if instead of filing an incompetent appeal, he had applied in revision under section 115 of the Code of Civil Procedure. **Achiran Bibi** *v.* **Babur Ali Sapui** 123

Secretary of State, if "an authority higher than a Provincial Government"; *see* Sanction 135

Section, machinery, perusal of, may often be useful and sometimes even necessary to elucidate the scope of the charging section; *see* Reference 5

Security Bond, if enforceable as a mortgage—Property under security bond, if can be attached and sold in execution proceedings; *see* Appeal, if lies 118

Separate lots of the properties to be sold are sold separately—Sale may be set aside regarding some lots and upheld regarding others; *see* Sale ... 168

Servient tenement—Acquisition—"Full Market value"—How to be paid; *see* Land Acquisition 105

Settlement, current—Interpretation of—Bengal Land Revenue Sales Act, 1868, section 12, except. 3; *see* Ejectment 173

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Settlement, permanent or periodic, of land by the lessee at a rate of rent less than that settled with him etc, the breach whereof would give rise to cause of action for recovery of khas possession contained in a covenant of the lease was a restrictive covenant only regarding sublease and not one to pay rent ; *see* Lease 36

——— ———, Revisional—If "current settlement" ; *see* Ejectment ... 173

Small Causes Court, failure of, to send the decree passed by it to the executing Court in time, if an irregularity ; *see* Irregularity 110

State, once any connection with a particular, is shown, the subject comes under the taxing power of the etsate ; *see Ultra vires* 265

Statement by accused induced by complainant—"Person in authority"—Evidence Act, section 24 ; *see* Evidence 149

——— made to prosecutor by a person not examined as a witness, if admissible in evidence—Evidence Act, sections 32, 33 ; *see* Evidence ... 149

Status—Cadastral survey record upto 1925—Entry of status—If admissible as regards same status continuing after that year ; *see* Ejectment ... 173

Statute empowering Executive Government to fix by notification the date on which the Act to come into operation—Inference as to intention of legislature to apply it to suits the cause of action of which arose before it came into force ; *see* Rent, suit for 1

———, provisions of, touching a right in existence at the passing of the statute, if to be applied retrospectively in the absence of express enactment or necessary intentment ; *see* Rent, suit for 1

Statutory provisions not controlled by justice, equity and good conscience ; *see* Contract Act 59

Sublease—Covenant in the head lease that lessee not to make permanent or periodic settlement of land at a rate of rent less than that settled with him—Covenant a restrictive one only regarding sub-lease and not one to pay rent ; *see* Lease 36

———Lessee's interest purchased by lessor at rent execution sale—Lessor entitled to realise direct from the sub-lessee the rent payable under the sub-lease and not the rent payable by the lessee ; *see* Lease ... 36

Submission, oral, by counsel supplementing the reference to Federal Court not to be allowed ; *see* Reference 5

Subscriber, deceased—Nominee has preferential right over natural heirs and defendants to receive the Provident Fund deposit ; *see* Nominee, position of 152

Subsequent contracts between buyer and seller as a result of satisfactory business relationship may not carry commission to broker ; *see* Contract 49

Substantial question of law—Effect and implications of Permanent Settlement—Finding that section 178B of the Bihar Tenancy Act is not *ultra vires* the Bihar Legislature ; *see* Leave to appeal 217

Succession and Estate Duties, difference between ; *see* Reference ... 5

Succession certificate proceedings—Question of title, if relevant ; *see* Nominee, position of 152

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Suit, an independent, on the original transaction for which a pronote was executed but the stamp of which was not defaced, if lies; *see* Limitation 112

—— by creditor dismissed as against a co-debtor—Another debtor had to satisfy the creditor's decree—Contribution suit if lies against the co-debtor; *see* Contract Act 59

—— for contribution—Deposit of arrears of revenue—One defendant No. 1 only contested—Suit decreed—Appeal by defendant No. 1 without making other defendants parties—The other defendants are necessary parties and defendant No. 1 can't get any relief in their absence; *see* Contribution, suit for 45

—— for possession—Code of Civil Procedure, section 66; *see* Presumption ... 248

——, If lies—Attachment before judgment rejected—Civil Procedure Code, order 21, rule 63; *see* Attachment before judgment 181

Taxation—Accrual of income abroad—Protection to person for his residence in a particular country; *see Ultra vires* 265

"Tenure" includes "all interest in land"—If includes interest of jotedar or raiyat; *see* Ejectment 173

"Tenant", connotation of—Bengal Non-Agricultural Tenancy (Temporary Provisions) Act; *see Ultra vires* 87

The Assam (Temporarily Settled Districts) Tenancy Act, 1932, if takes away pre-act right of the landlord to recover cash rent; *see* Rent, suit for 1

Title, question of, if relevant in succession certificate proceedings; *see* Nominee, position of 152

—— to property remains with the decree-holder though possession restored to judgment-debtor on re-opening of decree under section 36(2) of the Bengal Money Lenders Act till decretal dues paid off; *see* Bengal Money Lenders Act 155

Title-deeds of property, possession of, or issue of rent-receipts by wife would not afford any certain criterion for determination of *benami*; *see* Contract Act 59

Transfer, absolute power of, to Hindu widow by bequest to widow, if valid under Hindu Law; *see* Hindu Law 90

—— by Hindu widow without legal necessity when empowered to do so, if binding on reversioners; *see* Hindu Law 90

Transfer of Property Act, Section 65A—Lease by mortgagor of an English mortgage—Lessee's possession, if wrongful; *see* Ejectment ... 114

Trust, constructive, for rent—Decree for khas possession subject to liability for rent; *see Mesne profits* 229

——, *Criminal breach of—Criminal misappropriation—Owner of property—Contract of sale.*

The petitioner Dwijapada is an employee in the firm of Ghosh & Co., who are brick makers and part of his duties consists in writing some of the books of the firm. The other petitioner Nagendra is the sole proprietor of the firm Dutt & Co., who deals with building materials. It is alleged that Ghosh & Co., on certain dates sent bricks to Dutt & Co.,

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Trust—*(Contd.)* :

which Dutt & Co., purchased. The latter refused to pay for them on the ground that they had never received those bricks. Evidence was given as to receipt of bricks by Nagendra. Evidence also was given that the petitioner Dwijapada did not enter these deliveries in certain books of the firm Ghosh & Co., and the suggestion apparently is that this was done in collusion with the petitioner Nagendra. On those facts Dwijapada was tried on a charge of criminal breach of trust with respect to some bricks and Nagendra with abetting him in the commission of that offence. The conviction, however, was under different sections :

Held, there cannot be any criminal breach of trust or criminal misappropriation in respect of the bricks, inasmuch as the bricks became the property of Nagendra as soon as they were appropriated to the contract of sale between Ghosh & Co., and Dutt & Co. **Dwijapada Sinha** *v.* **Brahmapada Ghose** 126

Ultra vires—*Non-Agricultural Tenancy (Temporary Provisions) Act (IX B. C. of 1940), section 3—Constitution Act, Schedule VII, Entry 4—Civil Procedure Code (Act V of 1908), section 4(1)—'Tenant'.*

Order 21, rule 24 of the Code of Civil Procedure which directs that the Court should issue its process for the execution of the decree once the prescribed preliminary measures have been taken, is to be read subject to section 4 (1) and the operation of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, if falls under Entry 4 of List III of the Seventh Schedule to the Constitution Act, is saved by section 4(1) of the Code of Civil Procedure. Hence no question of repugnancy between the Civil Procedure Code and the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act arises.

A decree in ejectment against the respondents obtained on the 8th February, 1940, was confirmed on appeal on the 15th May, 1940. When the decree-holders applied for execution of this decree, on the 4th June, 1940, the judgment-debtors filed an application asking for stay of proceedings in terms of section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, which had come into force on the 30th May, 1940 :

Held, that the proceeding in execution should be stayed under section 3 of the Bengal Non-Agricultural Tanancy (Temporary Provisions) Act.

The word 'tenant' in section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act is used in the popular sense, that is of a person who was a tenant before the decree in ejectment was sought or obtained against him. Hence the section is applicable to a person against whom a decree in ejectment had been passed. **Mukunda Murari Chakravarti** *v.* **Pabitramoy Ghosh** 87

———*Bengal Money Lenders Act (X B. C. of 1940), sections 30, 36, if valid and operative.*

Sections 30 and 36 of the Bengal Money Lenders Act are valid and operative. These sections are severable from the rest of the Act. The Bengal

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Ultra vires—*(Contd.)*:

Money Lenders Act is in some respects at least *ultra vires* of the provincial legislature,

Entry 38 of List I, Schedule VII of the Constitution Act is limited to laws which affect the conduct of the business of bank *qua* banks, and hence sections 30 and 36 of the Bengal Money Lenders Act are valid and the liabilities of the debtors are fixed with reference to the provisions of these sections. **The Bank of Commerce, Limited, Khulna v. Nripendra Nath Datta** 133

Ultra vires—Bengal Money Lenders Act, sections 30, 36; *see Ultra vires* ... 133

———*Bengal Money Lenders Act (X B. C. of 1940), sections 30, 36 and 38—Constitution Act, section 100—Entry 28, List I and Entry 10, List III—Incidental encroachments of List I subject.*

Sections 30, 36 and 38 of the Bengal Money Lenders' Act are *ultra vires* the provincial legislature as to claims under promissory notes.

By making sections 30, 36 and 38 of the Bengal Money Lenders' Act, 1940, applicable to claims under promissory notes, the Act is an innovation of Entry 28 in List I of the Seventh Schedule to the Constitution Act; they affect sections 32, 79 and 80 of the Negotiable Instruments Act substantially. The attack against the above sections of the Bengal Money Lenders' Act, 1940 will not be met by treating them as legislation with respect to "Contracts" (Entry 10 of List III) as sub-section (2) of section 100 of the Act makes even legislation on List III matters subject "to the preceding sub-section", whenever such legislation is enacted by a provincial legislature.

Mere incidental encroachments on a List subject by a provincial legislature will not amount to a transgression of the prohibition imposed on the provincial legislature by sub-section (1) of section 100 of the Constitution Act.

Sub-section (1) of section 100 of the Constitution Act expressly denies power to the provincial legislature to make laws with respect to any of the matters enumerated in List I.

It would not be sufficient if the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List; their incidental character must be determined with reference to their relation to the subjects enumerated in List I.

The decision depends upon the determination of the question whether the provisions of the impugned Act encroach upon List I subjects to any substantial extent or whether the inference is only incidental. Thus the question whether the provincial enactment is or is not *ultra vires* must be determined in each case as it arises.

The question of the validity of the provincial legislature with respect to a matter enumerated in List II is not finally settled by a decision that the legislation is in pith and substance one dealing with such matter. **The Bank of Commerce, Limited, Khulna v. Kunja Behari Kar** 139

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Ultra vires—*Bengal Money Lenders Act (X B. C. of 1940), section 36—Decree obtained on promissory note—Provincial legislature, if can enact measures affecting promissory notes.*

Similar provincial legislation in pith and substance related to "money-lending and money lenders" (Entry No. 27, List II of Schedule VII of Constitution Act) and any argument based on the exclusion of promissory notes from the sphere of provincial legislation will not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the provincial Act.

The appellants' predecessor in title had obtained small cause decrees against the respondents in 1933 and 1938 respectively and certain payments had been made towards them. On August 30 and September 1, 1941, the judgment-debtors applied to the Court to re-open the decrees, scale down the debts and direct refund of amounts that might be found to have been over paid on taking accounts according to section 36 of the Bengal Money Lenders Act, 1940. The judgment-debtors were awarded small amounts by way of refund :

Held, that to such class of cases, section 36 of the Bengal Money Lenders Act, 1940, was applicable though the decree was passed on claims arising out of promissory notes.

The Bengal Money Lenders Act falls within the description, legislation in respect of "money-lending and money-lenders", a subject within the exclusive competence of the Provincial Legislature. (Entry No. 27 in List II).

Assuming that the Bengal Money Lenders Act, 1940 affects and was intended to affect rights and liabilities based on promissory notes, it does not necessarily follow that the Act must be wholly void as *ultra vires* the Provincial Legislature.

That among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

In the event of a conflict between provisions contained in a provincial enactment so far as they bear upon promissory notes and provisions relating thereto contained in a Central enactment, such conflict should be resolved by an extension of the principle of section 107 of the Constitution Act by analogy or by the application of the Canadian doctrine of the "occupied field". The argument would not support the plea of *ultra vires*, but would only bring in the principle of repugnancy, that is, in the event of and in so far as there is a conflict between Provincial Legislation and Central Legislation, the latter shall prevail.

In the present case, the Court is not concerned with the rights of parties under a promissory note. Here their rights and liabilities had merged in decree even before the passing of the Bengal Money Lenders Act, 1940.

The question of the severability of the invalid provisions of an Act from the valid provisions is material only if the Act is in some measure held

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Ultra vires—*(Contd.)*:

to be *ultra vires* the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a Central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. It is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied in this class of cases.

Section 36 (2) (a) of the Bengal Money Lenders Act, 1940, does not relegate the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was based. **The Bank of Commerce, Limited, Khulna** *v.* **Amulya Krishna Basu Roy Chaudhury & others** 220

Ultra vires—*Indian Income Tax Act (XI of 1922, as amended in 1939), Section 4-A (c) (2), 4 (1) (b), 64 (5)—Device to give jurisdiction—Extraterritorial jurisdiction—Imposition and assessment of income tax Residence in India—Objection as to place of assessment—Where and when to be taken—Effect of raising objection in Reference to High Court under section 66, Indian Income Tax Act,*

The second part of section 4-A(c) of the India Income Tax Act in so far as the Legislature authorising the inclusion of income arising out of British India is not *ultra vires* the Indian Legislature.

The provision in second part of section 4-A(c) of the Indian Income Tax Act is not extra-territorial in its operation. Even if they were in any measure extra territorial in their effect, that is not a ground for holding them to be *ultra vires* the Indian Legislature :

The amendment of the Indian Income-tax Act in 1939 introducing the test of residence in British India is not a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. It is only a machinery provision which was adopted as a convenient mode of extending it to this class of assessees a particular set of provisions contained in the Act for the calculation of their assessable income. The objection, if any, must be to the imposition of the liability itself and not to the manner in which the provisions imposing such liability have been drafted.

The imposition and assessment of income tax must vary according to the exigencies of public finance in India and the methods of doing business found to prevail in this country. If the conditions to-day require or justify other methods of taxation, there is no warrant for saying that the state here could only adopt the methods prevailing in England.

The mere fact of accrual of income abroad is not conclusive and when the cases refer in justification of such taxation, to the protection which a person enjoys by his residence in a particular country, the benefit of that protection is not limited to the income accrued or received in that country.

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Ultra vires—*(Contd.)*:

Once any connection with a particular state is shown, it creates a nexus between the state and the individual, so as to make that individual subject to the taxing power of the state :

The Indian Income-tax Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made. The fact that the Appellate Tribunal thought fit to allow the question to be raised and even included it in Reference to the High Court cannot alter the legal position.

Where the Partnership Deed shows that the gentlemen named therein shall carry on business in partnership as merchants and commission agents and reserves extensive powers to the appellants in respect of the business, the appellants though sleeping partners are still said to be carrying on business there within the meaning of section 64(5) of the Indian Income-tax Act: Observations of Lord Parker in *Mitchell* v. *Egyptian Hotels Limited*, explained. **Wallace Brothers & Co. Ltd. v. The Commissioner of Income Tax, Bombay, Sind and Baluchistan** 265

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NOTES OF CASES.

Bhagwati Prasad *v.* The Collector of Etah.

1944.

[1944] A. L. J. 28.

Code of Civil Procedure (Act V of 1908) section 115—Revision—Sections 47, 141, Order IX rule 9, if applicable to an order dismissing for default an application for execution—Section 151, restoration under—Order XLIII rule 1—No appeal lies.

Collector of Etah as President of a Trust Committee got a decree against Bhagwati Prasad for arrears of rent. It was put into execution thrice and was dismissed for default. On appeal by decree-holder the application for execution was restored. On revision to High Court :

Held [per *Malik, J.*]—That section 47 is not applicable to an application for setting aside an order dismissing an application for execution for default, that neither section 141 nor Order IX rule 9 applies to execution proceedings, that the order for restoration was made under section 151 and that no appeal lay against an order of the executing Court passed under section 151.

Thakur Prasad v. *Faquirullah* (1) and *Mukand Lal* v. *Gaya Prasad* (2) followed.

S. C.

(1) (1894) I. L. R. 17 All. 106 (P. C.) (2) (1935) 1935 A. L. J. 549.

Shidramappa Irappa Shivanagi *v.* Basalingappa Kushnapa Kumbhar.

1943.

I. L. R. [1944] Bom. 1. (F. B.)

Code of Civil Procedure (Act V of 1908), Order IX rule 13, Order XVII rules 2, 3—Interpretation.

The application for adjournment on behalf of Basalingappa the defendant who was absent due to fever was rejected and his pleader withdrew from the case for want of instruction. The court then proceeded with the suit and decreed it. The defendant's application under Order IX rule 13 for setting aside the decree was rejected. On appeal the application was directed to be heard on merits. On revision to High Court it was referred to Full Bench :

Held [per *Beaumont C. J.*, *Divatia* and *Weston, JJ.*]—That in view of the express provisions of Order V rule 1 of the Code it is difficult to regard the mere presence of a pleader in court as equivalent to his appearance, that the decree must be held to be an *ex parte* decree and not a decree on merits, that it comes under Order XVII rule 2 and that the application to set it aside was maintainable under Order IX rule 13 of the Code.

S. C.

Emperor *v.* Hasan Abdul Karim.
Emperor *v.* Akbarkhan Attamahomed.

1944.

46 Bom. L. R. 470.

Code of Criminal Procedure (Act V of 1898), section 411A—Act XXXVI of 1943—Retrospective effect.

On December 25, 1942 Hasan (accused No. 1) while dealing blows to a policeman rendering him unconscious called upon his companion Akbarkhan (accused No. 2) to stab him which he did as the result of which the policeman died. The two accused were tried by Blagden J. with a special Jury and were sentenced to death on October 12, 1943. On November 27, 1943 section 411A was added to the Criminal Procedure Code by Act XXVI of 1943 giving for the first time a right of appeal from the decision of a single Judge presiding at the Criminal Sessions of a High Court. On December 15, 1943, the two accused filed separate appeals against their conviction and sentence :

Held [per *N. J. Wadia* and *Weston JJ.*] —That the provisions of section 411A are not retrospective.

Badrudin v. *Sitaram Vinayak* (1) overruled. The nature of right of appeal discussed in detail.

S. C.

(1) (1928) I. L. R. 52 Bom. 753 ; 30 Bom. L. R. 942.

Kaza Sivaramakrishna Rao *v.* Jonnalagadda Seetharamayya and others.

1944.

[1941] II M. L. J. 2.

Code of Civil Procedure (Act V of 1908), sections 3), 42, Order XXI rule 10—Mortgage decree—Transfer to another court for execution—Power to sell properties within jurisdiction of trial Court.

The point for decision was whether in executing a mortgage decree

on transfer the court within whose jurisdiction a part of the mortgaged properties only is situated, has all the powers of the court passing the decree and can sell the properties lying within and without its jurisdiction :

Held [per *Leach C. J.* and *Shahabuddin, J.*]—That the transferee executing court can sell the properties lying both within and without its jurisdiction.

S. C.

Bishnu Singh *v.* Sri Thakurji Mangala Nain Bhagwan.

The decision of the Privy Council in *Bishnu Singh* v. *Thakurji Mangala Nain*, reported in this issue draws attention to an aspect of a question in Hindu Law which was not covered by any decision of any Indian Courts. The facts were that a Hindu gave away a portion of his properties to some relatives "with powers like myself to make all kinds of transfer" and with respect to the portion left the provisions of the deed were that he would have full power of transfer and after his death his wife would have power of transfer and that if neither exercised the power, in life time of each, the property would devolve on the daughter according to *shastras*. On the death of husband the widow exercised the power of transfer and the respondents in the Privy Council derived their title directly or indirectly from the widow. The appellants sued to set aside the alienation of the properties. It was clear and so held by their Lordships that the deed did not confer on the widow any absolute estate and though there were no words of bequest, the provisions in the document gave a clear indication of testamentary disposition. Nothing however turned on the last finding and their Lordships had to consider the case on principle. The matter was not of mere construction alone and the question did not rest by holding that the husband had conferred on the widow the full power of transfer. So that the question was whether in the above circumstances conferment of full power of transfer on a widow who would on the death of her husband get a limited estate was repugnant to any principle of Hindu Law.

In 1826, Hindu widow's position was considered by the Privy Council and Lord Gifford in delivering their Lordships' opinion said of her, "She is entitled to the possession of the property but that she is only entitled to enjoy according to rights of a Hindu widow, which it appears to me to be absolutely impossible to define. I mean the extent and limit of her power of disposing of it; because it must depend upon the circumstances of that disposition whenever such disposition shall be made and must be consistent with the law regulating such dispositions: "*Kasinath* v. *Harasundari* (1). Since then the decisions have been many and it is firmly settled that a widow takes only a restricted estate in the property of her husband and that at her death it passes to the heirs of her husband except as to such portion as may have been alienated by her for legal necessity. What happens if an absolute power of transfer is given to the widow who does not take an absolute estate? The law had to be applied to an intermediate case and although the case of *Promode Bala* v. *Krishna Sundari* (2) was referred to, the matter had to rest on principle. On the one end was the widow's estate with no power of alienation except for some purposes, while the other end contemplated an absolute estate. The conclusion that the conferment of full power of transfer on a widow without a bequest of the properties concerned is valid and not repugnant to any principle of Hindu law, is one not free from difficulty as has been pointed out by their Lordships of the Judicial Committee. When therefore we find in Mayne's "Hindu Law and usage" (10th Edn) page 752 the following passage, "The husband either intends that his wife should have a life-estate in the immovable property or intends that she should have an absolute estate", a doubt remains whether an intermediate or third possibility which is now shown prominently in this decision by their Lordships was ever contemplated. So far as the Calcutta High Court is concerned, reference may be made to the case of *Hara Kumari Dasi* v. *Mohim* (3) which contemplated the position of a widow taking by husband's will an estate for life with a power of alienation by sale or gift.

(1) (1826) Clark B. & O. 93; Shama Churn Vyavastha Darpana Vol II, p. 41.

(2) (1905) 1 C. L. J. 301, (3) (1908) 7 C. L. J. 540.

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REMARKS ON THE DRAFT HINDU CODE.*

By **Rishindra Nath Sarkar, Esq., M.A., B.L.,**

Advocate, High Court.

NO CODIFICATION OF HINDU LAW BE ATTEMPTED.

At the outset I record that codification of the *whole Hindu Law*—as suggested by the Hindu Law Committee in its Report dated 22nd April, 1941, and indicated in the preamble to the Bill or of *certain branches* of Hindu law as the preamble of the present Draft states, should not be hazarded.

The authorities relied on in the Report in support of codification of the whole of the Hindu law are separately arranged and discussed.

Mr. John D. Mayne, whose name is still a by-word to the Courts and lawyers regarding his exposition of Hindu law, has said, which the committee has quoted, "The age of miracles has passed, and I hardly expect to see a code of Hindu law which shall satisfy the trader and the agriculturist, the Punjabi and the Bengali, the Pandits of Benares and Rameswaram, of Amritsar and of Poona. But I can easily imagine a very beautiful and spacious code, which should produce much more dissatisfaction and expense than the law as at present administered" vide Paragraph 7 of Preface to 1st Ed.

Codification is necessary where the law is unsettled. According to your Committee, many of the rules of Hindu law are fairly well-settled and one can boldly assert that the whole of the Hindu law is well-settled as any other codified law of any civilized country. It can be said without fear of contradiction that every new enactment will be subject of new interpretations and will unsettle the well-settled law and will be a fruitful source of litigation instead of minimizing them.

Sir John Salmond's Jurisprudence, which has undoubtedly an international repute says, "that the value of codification is no

*The present article in the form of a letter was addressed in reply to Sir B. N. Rau, Kt, Chairman, Hindu Law Committee.

longer esteemed as highly when Sir John Salmond wrote. Codes like all express enactments require interpretation and the cycle recommences".

"In recent years the estimate of superior value of legislation in the sense of the direct declaration of new principles has declined, *All nations* with codes have found much 'interpretations' necessary; and Acts intended to codify English law in part have required *very much interpretations*". "The American Restatement may be regarded as an attempt to achieve the same purposes" (codification) "by means of a generally accepted Digest owing to the complexities of the American Constitution making a code impossible, which is probably a more scientific method".

Moreover, from past experience it can be said that one may not at all expect even a satisfactory drafting of the Bill codifying the whole of Hindu law. Soon after a small Act of five Sections (Hindu Women's Rights to Property Act) was passed in 1937, in 1938 an amendment with retrospective effect had to be made. Then came a number of amendments which led to the appointment of the Hindu Law Committee.

The Committee stated: "The recommendation which we should like to *stress most strongly* is that relating to the preparation, in gradual states", [avoiding "the risk of piecemeal legislation"] "*a complete code of Hindu* law * * *." In the similar object in view the L. A. Bill No. 26 of 1942 relating to intestate succession the preamble stated: "It is expedient to codify the *whole of the Hindu law*."

Now the preamble of this Draft Code states: "it is expedient to *codify certain branches* of Hindu law.

So the Committee in drafting now feel the difficulty of codifying the whole of the Hindu law which the universally admitted great *jurist* and expert on Hindu law condemned.

I, therefore, request the Committee to reconsider the views and suggest that codification of complete Hindu law is not expedient and suggest the amendment of only those portions of Hindu law for which the Committee was originally appointed.

PART I. PRELIMINARY.

HINDU WOMEN'S RIGHTS TO PROPERTY ACT BE AMENDED.

I suggest that the Hindu Women's Rights to Property Act should be amended for which the Committee was originally appointed.

In it the position of the daughter should be properly protected making clear provision for her maintenance and marriage expense to be met out of her father's estate as charges on it.

The provision for a predeceased son's widow and the widow of a grandson whose husband and his father both predeceased the latter's father is of greater necessity to women than providing the daughter with a share with her brother (or his son or grandson) in her patrimony which she might usefully spent during her husband's life-time and nothing may be left when she becomes a widow in the life time of her father in law or grandfather-in-law.

PART II. INTESTATE SUCCESSION.

I. SHOULD DAUGHTER GET A SHARE ALONG WITH PUTRA.

Women's position under existing Hindu law.—The Hindu law-givers, judiciously made express provision for woman, *but not for man*, at every state of her life.

Before marriage.—The daughter is entitled to maintenance befitting her position and status in the family and similar marriage expense out of the deceased father's estate. If the brothers separate before her marriage, she is entitled to a quarter share of what a brother is entitled to according to the Mitakshara school if partition takes place before her marriage or a provision for proper maintenance and marriage expense in partition made according to the Dayabhaga school.

After her marriage she is similarly entitled to get maintenance in accordance with the social status and position of her husband from him and on his death out of his estate.

If her husband dies without any male issue, she inherits the whole estate of her deceased husband, subject to certain limitations as regards alienation and the order of succession after her excluding her heirs.

If the husband governed by the Mitakshara school was joint and was at all desirous of his wife inheriting his interest in the joint family, he could easily do so by merely expressing his desire to separate from the joint family in unequivocal terms; otherwise, the wife is entitled to proper maintenance befitting her social position and the status of the family out of the joint family estate in which her husband had an interest. Be it noted that maintenance charges include residence, establishment, food, clothing, expenses for religious ceremonies and the like, in the style suitable to the posi-

tion of the claimant and of the family. The property must have been charged for these, but the Courts have held that these expenses must be made a charge on the property by a decree of the Court. The Hindu Women's Rights to Property Act places her in the position of her deceased husband in the Mitakshara joint family.

If the husband leaves behind him his widow and also sons, the widow is entitled to a share equal to that of her son under both the Mitakshara and Dayabhaga Schools. Legislation ensuring proper enjoyment of these interests have been provided in section 3(3) of the Hindu Women's Rights to Property Act which again requires amendment.

The *mother* and *grandmother* also are entitled to shares when the male descendants (sons, grandsons or great grandsons) make a partition.

Besides the above rights a woman might possess her own property known as the *Stridhana* property. Each Hindu woman possesses such property,—apart from immovable property, if any, —namely, her ornaments, the value of which is not insignificant compared with the status of the family to which she belongs.

No one is supposed to take greater interest in the daughter than her father regarding the daughter's rights in his estate. It can be asserted with absolute certainty that we seldom find a rich father to devise a share to his daughter equal to that of a son unless under a very exceptional circumstance. This is the best index for the general view on which the law of succession is to be based among every nationality, *i. e.* in the order or manner in which the deceased owner would have liked.

Therefore, the position of daughter is perfectly secured under the existing Hindu law.

The evil caused to the daughter by the Hindu Women's Rights to Property Act should be removed by the amendment of this Act for which the Committee was appointed.

Now let us consider the result that will ensue if the daughter is given a share along with her brother in her father's estate as the Committee want to incorporate in the Draft Code.

By marriage, under the existing law, the daughter loses her status in and goes out of her father's family. She will then naturally demand her share, if she becomes so entitled, under this new law. The inevitable result will be the disruption of the joint family, the normal condition of Hindu society. We are leaving out of consideration the position of the minor daughters,

where there are more daughters than one, when a partition takes place at the instance of the eldest daughter after her marriage. Later on the position of brothers is considered when they separate.

While she is busy in realizing her share from her brother, her husband's sister, like herself, perhaps at the same time, is trying to get hers from her brother out of her father's estate. The result will be that her husband's property will similarly be reduced by the same law, almost to the same extent, as she has carved out of her father's estate in possession of the brother. The husband's estate being reduced, her source of maintenance and consequently that of her family will be reduced. If she inherits the husband's estate she will get less perhaps by the same extent which she has obtained out of her father's estate. And if she becomes entitled to a share in her husband's estate, she will get a reduced share by perhaps the same proportion as she may get from her brother.

Therefore, the total quantity of property available to the husband and wife in both the brother's and husband's families practically remains the same, and the only change effected will be that a stranger, that is, sister's husband or sister's vendee, will be thrust in as a co-sharer in both her brother's and husband's families, to the great inconvenience of both, as will appear from what is more fully explained below.

In the majority of cases the actual shares of the hut and the land that a daughter may get under the proposed law, will be of no actual use to her, as the marriage of the daughter usually takes place with a bridegroom of a different place where she is bound to reside with her husband. But if she actully comes to live in her father's house with her husband, a stranger, which is not likely, it will bring untold misery to both the families. She will, therefore, have to sell her undivided share for which she will seldom find a purchaser, as similar process of partition and proposal for sale will be constantly occuring in every Hindu family after the marriage of each daughter, under this proposed law. Even if she gets a purchaser, he will not offer proper price, at any rate, of the portion of the dwelling house, as he will not be able to enter into immediate possession under section 44 of the Transfer of Property Act until a partition is effected by a protracted litigation entailing heavy costs. Or he may then get, after so much trouble, a proper price for that portion from the co-sharer if the latter exercises his right of pre-emption under the Partition Act. Therefore, constant ill-feeling, crop of litigations and deterioration of

value of property will be the result and will thus bring about ruin to every family.

Partition between brothers—cannot bring about a similar situation as between brother and sister because in majority of cases they may, and generally, separate in mess but live, as before, in their respective rooms, or, if possible, get it partitioned by metes and bounds and enjoy their allotted portions without much risk of their privacy being violated as they belonged to the same family. Their customs, habits and manners of living being the same, they live in peace and amity, a condition not possible among strangers. Whereas, the daughter who is bound to live in her husband's family under both modern and "archaic" laws, must, in the generality of cases, sell her portion of undivided or divided share in her father's property to a stranger, as her brother may seldom be in a solvent position to purchase her share.

The brother's son and daughter will, likewise, have to pass through the same procedure, *i. e.*, constant partition and sale of daughter's shares will be going on unnecessarily in each Hindu family and at every step of devolution of heritage.

Daughter's property.—There may be some who believe that the position of the daughter will be improved as she will have her separate property and her husband shall not be able to deal with such a share at his pleasure and she may keep her property separately for her own use.

But that position she will seldom be able to maintain. A Hindu wife even if her share be immovable property and not a liquid cash, (to which, however, in large majority of cases, her share in her father's estate will ultimately be converted), willingly allow her husband to dispose of her properties—immovables and movables—including even ornaments when her husband is in pressing need. It may be urged that a wife is forced or prevailed upon to part with her properties. But this difficulty will not be solved if she gets a share of her patrimony under the proposed Act.

Where is the equity in the proposed law—whereby the husband's inherited estate is forcibly reduced in providing shares to his sister or sisters and at the same time the poor husband is pinned down to the liabilities to maintain his wife and their children without rateable reduction of this burden, at any rate by the amount of share he had to part with for his sister or sisters.

Why not the wife be made liable to maintain the husband and her children when the Committee is giving her more property than man ? If the woman wants any share let her have it by all means with the burden attached to the property and relieve the husband's liability for her and of her children's maintenance by a proportionate amount and the wife's property be charged for the same.

Under the proposed code women are given more property—The following statement will demonstrate that equal status cannot be adjusted in a better way than that given in the existing Hindu law. For proper enjoyment of those rights some safeguards are to be imposed on account of case-law. So long the brother and sister do not separate under the proposed law their position may be deemed equal.

A daughter gets a share whatever it may be and let that be represented by the letter "x".

So long as the husband is alive she will possess "x" plus her own maintenance and that of her children from her husband who may only possess property "y" out of the property inherited from his father after giving his sister a share equivalent to "x". If the husband dies, she is in possession of "x" but gets "yı", "yı" represents a share equal to that of her son in her husband's family. Thus woman's position under the proposed Act will always be better than man and not equal.

A certain class of Hindu women are obsessed with the idea that their position is inferior to men and any change is always good. But let us have their frank confession about the position which each of them occupy in the family to which she belongs. The position of wife or mother in the family is much superior compared with the husband or son and that of brother and sister is equal.

The various commentaries of the Smritis with the exception perhaps of the Mitakshara, came into existence during the Mohammedan rule, and none of these discuss the question of providing a share for a daughter along with her brother in the father's heritage. The daughter along with her brother get a share in the father's estate according to the Mohammedan law, and, therefore, it cannot be said that the Hindu commentators of this period were ignorant or unmindful of the daughter's cause. Nor did the Rulers of that period ever take any step to remedy

the so-called injustice done to the daughter by the Hindu law-givers.

Views of learned persons.—*Balam Bhatta*, fictitious name of *Lakshmi Debi*, the reputed lady commentator of the Mitakshara, did not observe even that the daughter was inequitably treated in Hindu law.

Neither Dr. Troylaksha Nath Mitra, the Tagore Law Professor on "Hindu Widows", nor Mr. Rajkumar Sarbadhikary, the Tagore Law Professor on "Hindu Law of Inheritance", nor Sir Goorudas Banerjee, the Tagore Law Professor on "Hindu Law of Marriage and Stridhan", nor Dr. Priyanath Sen, the Tagore Law Professor on "Hindu Jurisprudence" did ever express any view that the Hindu law of succession regarding the daughter requires any change as proposed in the Draft Code. Nor did Mr. John D. Mayne or Shastri Golap Chandra Sarkar, both distinguished writers on Hindu law, ever felt that the position of daughter required any revision in the manner suggested by the Committee.

II. HINDU WOMEN'S ESTATE.

Hindu women's estate—should be amended and incorporated in the Hindu Women's Rights to Property Act in the lines of the Draft Code on the subject with slight modification. The three widows contemplated in that Act shall have absolute right of enjoyment during their life-time (including the right to alienate absolutely the whole property without legal necessity), but if anything is left after their deaths the inheritance is to be traced from the owner from whom they inherited.

The daughter when inherits her father's preperty shall also inherit absolutely and on her death her descendants and husband shall inherit in the order according to the existing Hindu law but in their absence father's heir shall get it.

But I disagree with the reason quoted in the Report, namely, the Hindu Women's limited estate is described as "the greatest single obstacle to the emancipation of Hindu women". As I have indicated elsewhere I confess, I do not understand what is meant by emancipation of women. Mr. Bernard Shaw who does not require any introduction, thus says :

"Unless woman repudiates her womanliness, her duty to her husband, to her children, to society, to the law and to everyone but herself, she cannot emancipate her."

III. WOMEN'S RIGHTS CURTAILED IN THE DRAFT, FOR INSTANCE :

(*i*) *Mother*—is placed much lower in the order of succession. Son inherits her but she is placed after, son, grandson, great grandson, widow, daughter and daughter's son when partition is made.

(*ii*) *Grandmother*—is similarly placed much lower in the order of succession.

(*iii*) *Predeceased son's widow* is deprived of the right given under the Hindu Women's Rights to Property Act. Her position requires greater protection than giving a share to a daughter, inasmuch as, her interest was properly protected by Hindu law but for the drafting of Hindu Women's Rights to Property Act. No protection is given to predeceased son's widow in certain circumstances under the existing Hindu law as interpreted by Courts

(*iv*) So also the case of the *grand daughter-in-law* whose husband and father-in-law both predeceased the latter's father.

The rights given to the widows referred to in Clauses (*iii*) and (*iv*) above by the Hindu Women's Rights to Property Act are about to be denied to them by the proposed repeal of the Act by this Code.

IV. ORDER OF SUCCESSION AGAINST HINDU PRINCIPLES.

The order of succession as drawn by the Committee is against the spirit of Hindu law and the sentiment of the Hindus. It is inequitable and will work great injustice in many cases. I have cited above some instances.

V. MITAKSHARA LAW.

The Mitakshara law is proposed to be completely changed and no sign of joint family law, in either of the two principal schools of Hindu law, is preserved.

The spirit and utility of joint family is not appreciated nor liked by many persons with western culture ; many of them do not recognize relation like a brother or sister if he or she is not so fortunate like them. That is the spirit behind the proposed abrogation of Hindu joint family.

PART III. TESTAMENTARY SUCCESSION.

There is no necessity of this part in imitation of the terms used in the Indian Succession Act. The use of the word "intestate"

ought to be deleted from the body of the Code in Part II, and the Clauses of the Bill in this part be revised accordingly, if the Code is insisted upon.

PART IV. MARRIAGE AND DIVORCE.

(i) DIVORCE NOT BENEFICIAL PARTICULARLY TO WOMEN.

The institution of marriage—is present in every human society in some form or other. In many societies marriage is said to be a contract ; it seems to be incorrect as such marriages are based on love and that the consideration is love. But among the Hindus it is a sacrament, union being strengthened by love following the marriage. The sole guiding factor for the continuance of a happy life in every marriage is love. Then how can this sacred connection be a subject-matter of contract ?

But some may, while supporting the above view, be inclined to think, what is the harm if marriage based on love be made tenable for a period, instead of enduring for the life-time of the parties ? Parties to the marriage according to them, should be the best judges whether their marriage should or should not last during their lives or is to be terminated by divorce. The relation between sexes is to be defined by the law of the realm and it cannot be safely left to the parties. There must be sanction for any breach of such rule for peace and prosperity of the society.

Divorce not allowed in Hindu law.—The Hindu marriage, however, cannot be dissolved. But it was laid down by *Narada* and *Parasara* that "another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopt a religious order, or be impotent, or become outcaste" ; and, therefore, dissolution of marriage must be presumed to have been sanctioned. But the Hindus never followed *Narada* or *Parasara*. There are, however, certain forms of divorce sanctioned by the custom of certain lower classes of Hindus, which, again, the educated amongst them never follow.

The Hindu law-givers provided no law for divorce and this was for the peace and harmony of the society and for greater benefit to women than men in particular. Women require protection of men, however the modern women may question and try to disprove it, it is a patent fact. No attempt should be made to disturb it to meet insignificant number of cases of so-called hardship.

Let us consider who will be the worst sufferer—the husband or the wife—should a divorce take place.

Among the Hindus a maiden's marriage has become a very difficult problem, unless her guardian be in a position to provide her with a handsome dowry. [Hindu law has made provision for it. No law can provide any rule for an impecunious guardian unless the State provides funds].

What benefit then a divorced woman would derive, if she shall have little chance of getting another husband? A divorced woman in a marriage negotiation holds a very inferior position to a maiden, and an intending bridegroom may naturally have reasons to suppose that his married life may meet the same fate as that of her former husband if he marries her. Moreover if she possesses children her case would be hopeless. So patched up peace is far better.

Physical defect of a spouse.—In some of the enactments providing divorce one of the grounds for dissolution of marriage is the physical defect of a party. If this be a ground for divorce then why should we not have a law for abandoning a cripple, a blind or the like issue of a marriage? These children are as useless as a useless husband or a similar wife. Why should an old invalid parent be maintained as he or she bestows no good to the family except trouble and unnecessary expenditure?

Considering the problem from the point of view of the issue of a marriage the divorce law is more harmful than beneficial.

In enacting such a law in India the legislators should not forget what would be the fate of divorced women in villages who do not want to go in for another marriage but are quite incompetent to earn their livelihood. The community as a whole is to be taken into consideration and not individual cases of hardship.

If the extra-judicial evidence of the divorce cases and the post-divorce history of the parties be studied, one would at once suggest the repealing of existing law on divorce where it exists. A nation's marriage law is to be based on sanctity and with an eye to the well-being of the issue who will form the nation of to-morrow.

The great thinkers of an advanced society like that of England, inspite of their law of divorce and inspite of there being innumerable cases of dissolution of marriage every year, look down upon the parties to a divorce suit. The great living modern writer of

England says regarding marriage: "What God hath joined together no man shall put asunder: God will take care of that." In a recent appeal before the House of Lords (*Fender v. St. John Mildway*, (1938), A. C. 1, 34-35), Lord Russell in the course of his dissentient judgment says: "The institution of marriage has long been on a slippery slope. What was once a holy estate enduring for the joint lives of the spouses is steadily assuming the characteristics of a contract for a tenancy-at-will."

Let us assume that the Hindus should have a law legalizing divorce. Should it be dependent on the pleasure of the individual parties to the marriage or be made contingent on some grounds to be decided by a Court on some data embodied in an enactment? In short, the divorce law is to be fixed between a wide range, from strictest restriction paramount to no divorce, to divorce at the option of each party to a marriage without the consent of the other party and without any restriction whatsoever. The Bill that was introduced in the Central Assembly on 9th January, 1939, but has been rejected, was unilateral like the Muhammedan law, but unlike it, in that Bill the wife only was intended to have the right to divorce and not the husband and that on proof of certain grounds and not on the humour of the party. Therefore an artificial barrier put at one place or at another, allowing or disallowing a divorce, has no charm nor reasons behind it unless there be absolute bar or no bar at all.

If there be a proper demand for such a law by the mass no body can resist such a law. But there is no such demand and if it is thrust upon them against their wishes, no Hindu should pass sleepless nights over it, as it will be similarly availed of as the Hindu Widow Remarriage Act of 1850.

(*ii*) INTER-CASTE MARRIAGE.

The Hindu law allowed *anuloma* and *pratiloma* marriages between different castes. So the Hindu law of marriage be amended by legalizing marriage between different castes but according to Hindu rites.

CONCLUSION.

(*i*) Except what is stated above I express no opinion on the other portions of the Draft Code.

(*ii*) I must not be supposed to approve the other portions. I am against codification of Hindu law, but I am in favour of the amendments indicated above.

Notes of Cases.

Ajablal *v.* Haricharan.

Code of Civil Procedure (Act of V 1908) section 50, Order XXI rule 22 (1)—Mortgage execution—Sale after service of all necessary processes held just after death of the judgment-debtor without notice to legal representatives, if void against them.

1944.

46 Bom. L. R. 470.

Sale in execution took place on 1st July, 1938, while the only judgment-debtor interested in the equity of redemption of the property in suit died on 30th June, 1938. Ajablal a legal representative of the deceased judgment-debtor impugned the sale as void. The matter was referred to Full Bench :

Held [per *Chatterjee* and *Sinha JJ.*, *Meredith J. dissentiente*]—That a sale held in execution of a mortgage decree after the death of the judgment-debtor but after the service of all necessary processes including the sale proclamation without any notice to his legal representatives is void in the sense that it is not valid and operative against the legal representatives.

[Per *Meredith J.*, In none of the circumstances which can arise within the terms of the reference is the sale void in the sense that it can be attacked collaterally or ignored. The sale may, however, be voidable upon a proper application or suit as the case may be.

Cases of different High Courts bearing on this point discussed.

S. C.

Reviews.

Digest of Case-Law for fourteen years : By V. M. Kulkarni, published by the author from Lahore, Vols. I, II and III, Pre-publication price for the complete set, Rs. 66.

Nowadays digests of case-laws are indispensable adjuncts to a lawyer's library ; so, the present publication is likely to evoke some interest among the members of the legal profession. The most striking feature about this publication that will arrest immediate attention of everybody is the novel method introduced in it of grouping together the decided cases under the relevant sections of each statute. In departing from the usual practice hitherto followed of classifying the decided cases according to the topics on which they turned, the learned author has evidently thought that his method would prove more helpful to the lawyers than the other

one. We won't, however conceal the natural misgiving in our mind as to the soundness of this idea. We really fail to appreciate how cases decided on general principles or on rules of equity and without any reference to any particular section of any particular statute can be spotted out from a digest in which the notes have been arranged under statutory headings. The learned author's anxiety to render useful assistance to the busy practitioner is undoubtedly very laudable, but we are not quite sure if the novel method adopted by him will secure that objective. Digest-hunting starts with reference to legal topics in hand and if the pertinent section to which the topic under enquiry is referable be unknown, then a resort to this publication will be a fruitless affair entailing loss of both time and energy. The new method of this book is certainly not without any utility; at least it will serve the purpose of a number of annotated editions of individual Acts. In that respect the value of this publication will be immensely great especially when we remember that every Act has not as yet come to be annotated or commented on. According to the learned author the necessity of a digest of case-lawsarises from the fact the commentaries on the individual statutes cannot be exhaustive. If a big volume of commentaries on a single statute cannot be exhaustive, how can the learned author expect to squeeze in hundreds of commentaries within the short compass of a few volumes and at the same time make them more exhaustive than the individual productions. However, we do not propose to throw any cold water on the optimistic views of the learned author and leave them to take their chance with the test of time. The book has been printed and got up very nicely and that is a very great point in its favour.

The Bengal Tenancy Act; by D. Bose, published by P. Basu, 1943 Vol. I, price Rs. 4.

This small publication has been undertaken with the manifest intention of providing the mofusil lawyers with a handy but serviceable commentary on the Bengal Tenancy Act, and without entering into a lengthy discussion over the merits and demerits of the work, we can at once say that the learned author has fairly succeeded in fulfilling his mission. The provisions of the Act have been correctly analysed and properly elucidated with reference to the decided cases. All the recent amendments of the Act have been duly incorporated in the book and their effect carefully noted. The learned author has pointed out which of the old decisions now stand superseded in view of the new amendments. His notes on the amended section 52 of the Act will be an apt illustration of

this point. The notes on the case-law are concise, accurate and always to the point and are never over-burdened with a superfluity of citations. The book, however, suffers from one handicap; the learned author himself being a member of the Judicial Service, has been somewhat shy in the matter of expressing his independent views on the correctness of some of the reported cases of doubtful accuracy.

Rights of women under the Hindu Law: By J. R. Gharpure; published by the University of Bombay, 1943; Price Rs. 2-8-0.

This small volume is a reproduction of the lectures on the rights of Hindu women, which the learned author, being invited by the Bombay University, delivered in commemoration of Sir Lallubhai A. Shah. This book has been published at the most opportune moment and is calculated to be of great use to those who are now deeply engaged in discussions over the merits or demerits of the proposed legislation on Hindu Law. The learned author well versed in the lores of Hindu Law has traced the position and rights of the Hindu women from the times of the Samhitas and compared the same with those of the women of other countries. He is a powerful advocate of women's cause and seems to have successfully pleaded for their amelioration. He has shown that the women had a much better position under the old Shastras and her present comparatively inferior position has arisen from the ill appreciation of the English Judges of the Shastric law, and urges the Legislature to restore them to their former position of glory. Before reading his book one may happen to differ from his views but once one has read it, it will be difficult for him to resist becoming a proselyte to the same. Forceful reasoning, clarity of ideas, perspicuity of thought, elegance of expression and freshness of style are only some of the manifold points of merit in the book. Though we have unstinted admiration for the wide range of materials on which the learned author has drawn in writing out the book, still we cannot help thinking that the inclusion of the works on sex psychology or feminine physiology in his bibliography has served scarcely any other purpose than adding a stink to an otherwise fragrant piece of composition.

Bombay Rent Restriction Act of 1939 together with Bombay Rents Hotel Rates and Lodging House Rates (Control) Act by V. K. Desai, published by Chandrakant Chimanlal Vora, Ahmedabad; 1944; Price Rs. 1-8 net.

This small volume on the law relating to Rent Restriction in

the city of Bombay comprises the texts of two recent local statutes of that Province with such short notes thereon as the learned author has thought fit to append to some of the more important sections thereof. A reviewer's task in connection with such publications ends with a mere announcement of its publication just to call the attention of those who may feel interested in it Absence of complexity in the subject and itse phemeral character are perhaps the chief reasons for the learned author for not taking great pains over the subject or for not going very deep into it. Any how, the publication has a utility of its own and will prove serviceable to those who are desirous of reaping the benefit of the two current rent restrictive statutes of the Province of Bombay or to the victims of those two statutes, who are anxious to get out of their clutches.

Labour and Factory Legislation in India by H. M. Trivedi of the Middle Temple ; Publishers N. M. Tripathi Limited of Bombay, 1945, Price Rs. 15 net.

This publication is more a collection of statutes than a legal treatise on the law relating to labour and conditions of employment in factories. So far as we are aware, this is the first publication of its kind and has removed a real want. The labour and factory people and those who are interested in protecting the interests of such people will undoubtedly congratulate the learned author from the core of their heart. Although the publication includes both the pre-war and war-time legislations of the Central Government, still it is not likely to be of any great use to the people outside the Bombay Presidency inasmuch as it has not included within its compass the local statutes and the rules of the Governments of provinces other than Bombay. We, however note with great pleasure that the learned author has an intention to make the publication a more comprehensive one by the inclusion of the statutes and the rules of the other provinces also in the near future. The most important part of the work is the Introduction in which the learned author has given admirable summaries of the provisions of the different statutes embodied in the work. With the help of these summaries, the readers will at once know the real scope and object of each statute relating to the subject of labour and factory legislation. In the said Introduction, the readers will find also a brief sketch of the salient features of what is now known as Beveridge Plan as also some discussions over some of the burning problemsof social legislation in relation to labour and factory administration. The execution of the work has been carried out with the usual excellence characteristicof all " Tripathi " publications.

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POSITION OF NONRESIDENTS UNDER THE INDIAN INCOME TAX ACT.

By

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The Indian Income Tax Act defines the word Assessee in section 2 of the Act. 'An Assessee is a person by whom Income Tax is payable'. Each of the Taxing sections 7, 8, 9, 10, 12 says, 'The Tax is payable by an Assessee'. The first question therefore to be determined is :—

Can a nonresident individual or person be an Assessee under the Act ?

To make an Assessee of a person some conditions of Fact and Law must be satisfied. A Person cannot be an Assessee under the Act unless these conditions are true of him.

These conditions are as follows :—

1. The person whether Resident or Nonresident must have some Total Income as defined in section 4 of the Act read with section 42.

2. His income must be above a minimum.

3. His income must not come within any kind of Exemption either according to the Provisions of the Indian Income Tax Act or according to the accepted principles of international law.

4. He, as a person, must be within the local extent of the Act as delimited by the Act itself and must not have been excluded from the Operation of the Act by express words of Law or by clear implication. Vide section 1(2).

The Act has two section with regard to its application. One is with regard to persons and this is section 1(2) called the extent of the Act. And the other is section 4 called the application of the Act. It is thus evident that the Income Tax Act does not see Persons only or Income only. It takes into consideration both Persons and Incomes. And it delimits them both for the purposes of the Act. To put the matter in the language of science it sees Persons through the Prism of Income. One is first a person and he becomes an Assessee only if the Tax is payable by him according to some provisions of the Act studied in their due relation to one another. This view is true in the case of Nonresidents also.

Now, some Nonresidents are kept within the purview of the Act by the Local Extent of the Act and some are kept out by clear implication. This will be clear from section 1(2) of the Act which runs as follows :—

It (meaning this Act) extends to the whole of British India including British Baluchistan and the Sontal Perganas and applies also within the Indian States and the Tribal Areas to British Subjects who are in the service of the Crown or of Local authority established in the exercise of the Powers of the Crown Representative of the Central Government in that behalf and to all Other Servants of the Crown in the said States or Areas.

A person, to be an assessee, must therefore first be within the delimitation enunciated herein. This is the first condition which he, as a person, will have to satisfy if he is to be brought within the mischief of the Act. The second condition is also expressed clearly in the Act itself. He must have Total Income as defined in section 4 of the Act.

Analysing section 1(2) of the Act we find

(1) That it is expressed in terms of territories and Persons.

(2) That it includes persons and territories specifically.

(3) That whatever persons and territories are not within this delimitation must be taken as excluded by clear implication.

The Act extends to the whole of British India including British Baluchistan and the Sontal Perganas. This may be interpreted as follows :—

That it extends to all British subjects in British India including British subjects in British Baluchistan and the Sontal Perganas. For Legislation as a rule runs only as far as allegiance does

OR

That it extends to all Residents of British India including the residents of British Baluchistan and the Sontal Perganas. The

main scheme of the Act seems to have been based more on the ground of Residence than on that of Allegiance though the element of political subjection has not been given a complete go-by.

The Act applies Also within the Indian States and the Tribal Areas to British Subjects who are in the service of the Crown or of a Local authority established in the exercise of the powers of the Crown Representative or the Central Government.

This may be interpreted as follows :—

That it extends also to some nonresident British subjects who are resident in the States. These nonresidents are definitely delimited so that a British Subject resident in China or Siam is not, as a person, within the Local Extent of the Act by the clear implication of the language of the section.

The Act applies to all other servants of the Crown in the said States or Areas.

This may be interpreted as follows:—

That it extends to all servants of the British Crown who may, by extended interpretation, be servants of the Government of India also, whether such servants are foreigner Individuals, Foreigner domiciled persons or British subjects pure and simple. Here therefore we find another group of Nonresidents who may as Persons be

a. Subjects of British India or

b. Subjects of other sovereign States

The section 1(2) therefore, mentions and delimits those Nonresidents who may be taxed. Is there any other class of Nonresident Individuals who may be Assessees under the Act according to the Local Extent of the Act itself. The answer must be in the negative. This is particularly so in view of the fact that both sections 3 and 4 of the Act are made 'Subject to the Provisions of the Act' the principal provision, as we interpret the act, being the provision with regard to the local Extent of the Act which is delimited in Persons and territories.

In the face of this interpretation the usual departmental interpretation that all who are not Residents under section 4-A are Nonresidents under the Act is fallacious. For to be, as persons, within the ambit of the Act such Nonresidents must further satisfy the conditions clearly expressed in the section on the Local Extent of the Act. They must be residents in the Native States and Tribal

areas being British subjects themselves. They must be Residents in Native States and Tribal areas as Crown Servants being subjects of any country whatsoever.

We should give here a few words for explaining the position. Every rule of law has three aspects. It may be regarded from the point of view of persons it affects. It may be regarded from the point of view of the rights and duties which it creates. It may also be viewed from the point of view of the remedies prescribed for the violation of the rule. Likewise every statute taken as a whole may be viewed from all these points of view. It may delimit its own field of operation from the point of view of the persons it affects. It may also be viewed from the point of view of the rights and duties it creates. Likewise it may prescribe in specific terms the remedies for the breach of the rules also. The Indian Income Tax Act has done all these. Instead of demarcating its field as far as possible in terms of Income only, it has demarcated its field in terms of persons also. And this is clear from section 1(2) of the Act as also from sections 3 and 4 both of which contain the words 'Subject to the Provisions of the Act'. Section 4 previously had the words 'Save As Hereinafter Provided' as proviso. But the present Proviso is more comprehensive. The persons whom these sections are to attract as Assessees must be within the delimitation expressed in the words of sections 1(2). The conclusion, therefore, is that those Nonresidents who are kept outside the purview of the Act by the terms of the Act itself are simply excluded from the operation of the Act. Others may only be exempted, as they have sometimes been, on account of their income being of a particular class and sometimes on account of their special position as Persons as in the case of the Viceroy of India, some diplomatic Representatives and some members of the Nepalese Force although such exemptions are expressed in the Act or the rules, in the language of income.

We should here point out that Exclusion of persons qua persons is one thing and exemption of a person's income is quite another. Exemption is a term which is applicable only to those who as a rule are liable. The Viceroy and Diplomatic representative of foreign countries are in such a position. The language of the Act may show that it is their income that is exempted. But a little examination will show that in substance and spirit they are exempted as persons, the very same class of income of other persons in different positions being specifically taxed by the Act itself in very clear terms.

There are of course provisions in the Act referring to the taxation of Nonresidents and this, too, in a very severe form in the body of the Act itself Vide section 42 of the Act. But however severe these provisions may be, they can be operative only within the limit set up in terms of persons and areas in the section on the scope of the Act itself. For once having specifically delimited the local extent of the Act any taxation that is carried out of the limit is clearly void even if it has been submitted to. It is an established doctrine of law that an illegal taxation can create no precedent for itself.

We shall now answer an objection that may be urged against the interpretation of section 1(2) which we ourselves have attempted. This objection is as follows :—

'This Act extends to the whole of British India.....' means 'this Act extends to all income in British India' and the section does not at all intend any delimitation from the point of view of persons. Our objections to this view are as follows:—

a. Words of a Statute even according to one of the latest decisions of the Privy Council are to be given their own natural meaning. They are not to be given an extended meaning from any general policy of law or any principles of jurisprudence. As the words now stand in section 1(2) they yield a clear and specific meaning which cannot be displaced by any kind of presumption in favour of the Intention or general policy of the Legislature.

b. "All Income in British India" even if placed for the words 'Whole of India' will not yield sufficient meaning for the purposes of the Act. Some incomes are deemed to accrue, arise or to be received in India and these words will also have to be read into the section for the purposes of this kind of Interpretation.

c. The word 'Also' with the word 'applies' in the section clearly shows that the Legislature intended delimitation in terms of Persons.

d. The Income outside India of Residents who are the principal subjects of taxation is definitely brought within the mischief of the Act by section 4 of the Act itself. It may here be stated that the Income Tax department will be the greatest offender if they interpret the words Whole of India as All Income in British India and repeat the words before every personal delimitation made in section 1(2).

e. The section does not contain the word 'Income' and yields a perfectly good meaning without it. This meaning will be more clear if we place the words. 'As an Act of Legislative enactment' after the word 'It'.

f. That the application of the Act in point of persons is in section 1(2) of the Act and that of the Act in point of income is in section 4, and finally

g. The word 'Non-resident' is no where defined in the Act or the Rules made under section 59 of the Act and its meaning is further confused by the definition of a class of persons as 'Not Ordinarily Resident' in the Act itself.

There are many exemptions in the Income Tax Act both of income and of persons though as we have already remarked some of the exemptions of persons are expressed in the language of Income. We shall not deal in detail with these with reference to Nonresidents. They are applicable only in the case of those Nonresidents who are within the purview of the Act according to the Local Extent of the Act. But as for the other Nonresidents who may have income in British India some sections of the Act must be otherwise framed to attract them or they go outside its scope according to the very letter of the Law. As we have aleady said we do not raise the question of jurisdiction here. We stand on the standing clauses of the Act, on the very definition of the word Assessee in the Income Tax Act and on the Local Extent of Act as expressed in the language of section 1(2) and on the fact that the word 'Nonresident' is not defined either by the Act or in the Rules made under it.

We may refer here to another class of Nonresidents who cannot be taxed. These Nonresidents may be drawn as Persons by section 1(2) of the Act. But if they are noncitizens and have their dimicile elsewhere in a foreign sovereign state, they cannot be taxed if all their income is only what is called "Intangible Personal Property in International Law". As between two fully sovereign States one should not displace a principle of International Law. As between a sovereign State and Subordinate India whose legislature has promulgated the Indian Income Tax Act, the question is still more delicate. Such Nonresidents, therefore, as are legitimately within the purview of the Indian Income Tax Act as Crown Servants cannot be taxed on their Intangible Personal property such as Income from Shares, Securities, Debentures and so on. They can however be taxed on the income of their Real and Tangible personal property if the relevant Act of a foreign sovereign

Legislature specifically does so. International law will support taxation to such an extent.

The truth is that the Indian Income Tax Act is not a happy piece of legislation with regard to its provisions for attracting Nonresidents and if the department of Taxing tries to supplement it according to their own ideas they will simply roam in a region of uncertainties. They have done so till now and is not likely to fare better in the near future. But in this contribution we have nothing to do with this aspect of the matter.

Summarising the position of Nonresidents under the Act we may lay down the following points for the use of the practising lawyers.

A. That in the Act the word Nonresident primarily means only a subject Nonresident. For extended use the Legislature must use definite and specific words. The word cannot as a word of law mean or imply a noncitizen or an undomiciled person. Moreover the word is not defined in the Act or in the rules made under it.

B. That the Indian Income Tax Act by defining the word resident in section 4-A in a particular way has made the field of Nonresidents vague, confusing and uncertain. It has eliminated domicile and allegiance in one place and retained it elsewhere.

C. That the Income Tax Act has further confused the field of Nonresidents by introducing a class Not Ordinarily Resident into it. They have here taken by implication the elements of allegiance and domicile into consideration after having rejected these elements by the wordings of section 4-A. Moreover the words 'Not ordinarily Resident' themselves mean Nonresidents.

D. That only those Nonresidents may be taxed who are within the local extent of operation of the Act as delimited by section 1(2). Such Nonresidents alone can satisfy the conditions which can bring Assessment into existence and may come within the definition of the word Assessee in the second section of the Act.

E. That of these Nonresidents who alone can be attracted by the provisions of the Indian Income Tax Act, only those the Legal Situs of whose property is in international law in British India and the delimited territories can be taxed inspite of the provisions of section 42 of the Act taxing Nonresidents.

F. The word Non-Resident and Not Resident wherever it may be found in the Act must be interpreted as such Non-resident as have been attracted within the purview of the Act by the express

provisions about the local extent of the Act in the Act itself *i.e* by section 1(2) of the Indian Income Tax Act.

The Income Tax Department should not confuse between the two words Extent and Application. The Extent of the Act is clearly laid down in section 1(2) and the Application of the Act which has a comprehensive and amended Proviso is not in section 1(2) but in section 4 of the Act itself.

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